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No. 03-1160

IN THE

Supreme Court of the United States

AZEL P. SMITH, *et al.*,

Petitioners,

v.

CITY OF JACKSON, MISSISSIPPI, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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COUNTERSTATEMENT OF THE CASE

1. Petitioners are police and public safety officers employed by respondents, the City of Jackson and its Police Department. J.A. 3-4. Petitioners claim that respondents violated the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621-634 (App. 15a-45a), by adopting and implementing new pay plans that, among other things, allegedly had an unlawful disparate impact on officers age 40 and over. J.A. 4-7, 15-31. Petitioners' expert reported that employees age 40 and over had received statistically smaller initial pay raises than officers under age 40. Pet. App. 4a-5a. Respondents' experts reported in reply—without contradiction by petitioners—that, even after initial pay increases, older officers statistically were still paid more overall than younger officers and that younger officers were employed in greater proportions in the lowest ranks where the new pay minimums established the greatest increases over prior pay. App. 3a-6a, 8a-14a (R. 464-66, 478-79, 496-99).

2. The district court granted summary judgment. Pet. App. 39a-48a. It found legally insufficient evidence that the pay plans were adopted or applied with a discriminatory motive. Pet. App. 45a. It also concluded "that the ADEA does not allow for claims of disparate impact." Pet. App. 48a.

3. On appeal, the Fifth Circuit vacated as premature the district court's ruling on the disparate treatment claim. Pet. App. 2a. On the disparate impact issue, however, the Fifth Circuit agreed that the ADEA's prohibitions are "read most naturally as outlawing only conduct motivated by age." Pet. App. 9a. The court also found that the ADEA's "reasonable factors other than age" provision, 29 U.S.C. § 623(f)(1), "counsels against recognizing a disparate impact theory under the ADEA," Pet. App. 13a, and is "a clear textual difference between the ADEA and Title VII regarding employer liability—a distinction that, if nothing else, plainly contradicts the argument that the cognizability of a disparate impact claim

under Title VII . . . controls the cognizability of a disparate impact claim under the ADEA." Pet. App. 17a-18a (footnote omitted). The court further stated that "absent from the scope of the ADEA" are the concerns that, "in the Title VII context, led to the recognition of disparate impact claims." Pet. App. 21a. Judge Stewart dissented on this issue. Pet. App. 28a.

SUMMARY OF ARGUMENT

Consistent with traditional notions that unlawful discrimination requires actual discriminatory intent, this Court has indicated that it will recognize "disparate impact" claims—*i.e.*, claims based on unjustified adverse effects rather than on discriminatory intent—only where there is "convincing evidence" that Congress intended them. The ADEA contains no such evidence.

I. Section 4(a) of the ADEA applies only to employer decisions taken "because of" age, a conventional reference to discriminatory intent. Moreover, by providing that a decision is lawful where "based on reasonable factors other than age," Section 4(f)(1) confirms that non-discriminatory intent is dispositive—an approach that is incompatible with disparate impact claims. In addition, other statutory provisions and legislative history reveal that, rather than prohibit neutral decisions with adverse effects on older workers, the ADEA addresses such disadvantages through education, training, and manpower programs. Finally, disparate impact claims are incompatible with the ADEA's scheme, including its jury trial provision, opt-in procedures, and continuum of protected individuals. Indeed, because non-age factors having differential age-specific impacts are inescapable, recognition of ADEA disparate impact claims would predictably force employers to abandon valuable practices and/or make use of quotas. There is no basis for construing the ADEA to do so.

II. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and its progeny under Title VII do not support recognition of

ADEA disparate impact claims. In addition to being enacted before *Griggs*, the ADEA addresses much more limited concerns than does Title VII; in particular, the concerns that led to recognition of disparate impact claims under Title VII are absent in the ADEA. Because older workers as a class have not suffered a history of purposeful unequal treatment, shortcomings in their abilities and performance cannot be attributed to prior discrimination. Moreover, discrimination against older workers is not normally motivated by deep-seated animus, but rather by generalizations about individual workers' abilities to do a job. In any event, even under Title VII, disparate impact claims are not recognized where statutory provisions foreclose them; by making discriminatory intent essential, Sections 4(a) and 4(f)(1) of the ADEA foreclose disparate impact claims.

III. The "independent" textual and legislative purpose arguments that petitioners offer for recognizing ADEA disparate impact claims fare no better. The "reasonable factors other than age" provision does not imply that such claims are cognizable; rather, it confirms that, in both "pretext" and "mixed-motive" cases, no liability may be imposed for actions based on reasonable intentions. Moreover, the "because of" language refers to more than mere causation, as is confirmed by *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993) (requiring a showing of intent as well), and even *Griggs* (also requiring a showing that a practice with adverse impact is demonstrably unjustified). Finally, disparate treatment doctrine fully meets the more limited purposes of the ADEA.

IV. No deference is owed to the view of the Equal Employment Opportunity Commission ("EEOC") that ADEA disparate impact claims are cognizable. The regulation to which petitioners refer neither construes Section 4(a) nor affirmatively recognizes disparate impact claims. Moreover, the Department of Labor ("DOL") did not recognize ADEA disparate impact claims, and the EEOC's later-adopted view

conflicts with briefs of the Department of Justice ("DOJ"), is not supported by valid reasoning, and is contrary to law. Finally, there has been no congressional acquiescence in or ratification of the EEOC's view.

ARGUMENT

This case presents the question whether Section 4(a) of the ADEA, 29 U.S.C. § 623(a), makes actionable "disparate impact" claims—*viz.*, claims that employer decisions that are neutral on their face are unlawful, without regard to whether the employer's motive in making such decisions was the ages of the pertinent individuals, because the decisions have disproportionate adverse effects on older workers and do not have a demonstrated justification. As proved below, the text, structure, and history of the ADEA show that the statute does not provide for "disparate impact" claims.

The essential tradition of federal anti-discrimination law, in its multiple constitutional and statutory manifestations, is to make actionable "disparate treatment" claims—*viz.*, claims that decisions adverse to members of a protected class are unlawful because the decisionmaker's motivating consideration in making the decisions was the protected class trait (*e.g.*, race, gender, age). *See, e.g., Akins v. Texas*, 325 U.S. 398, 403-04 (1945) (Equal Protection and Due Process Clauses); *Radio Officers' Union v. NLRB*, 347 U.S. 17, 42-44 (1954) (National Labor Relations Act). The Court has recognized that statistics may be probative evidence for such "disparate treatment" claims. *See, e.g., Teamsters v. United States*, 431 U.S. 324, 339-40 (1977); *Mayor of Philadelphia v. Education Equality League*, 415 U.S. 605, 620 (1974). At the same time, out of respect for the essential tradition of federal anti-discrimination law and out of concern for the far-reaching implications of disparate impact theories of liability, the Court has declined to recognize disparate impact claims unless there is "convincing evidence" that the particular anti-discrimination law goes beyond the norm and provides for such claims. *Gen.*

Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 391 (1982) (42 U.S.C. § 1981). *See, e.g., City of Mobile v. Bolden*, 446 U.S. 55, 61-74 (1980) (Fifteenth Amendment); *Washington v. Davis*, 426 U.S. 229, 238-48 (1976) (Equal Protection Clause); *Alexander v. Sandoval*, 532 U.S. 275, 288-93 (2001) (Title VI).

The ADEA contains no such convincing evidence. As this Court held in *Hazen Paper*, "[d]isparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA." 507 U.S. at 610. While not directly resolving the status of disparate impact claims, *id.*, the reasoning of *Hazen Paper*—to wit, that the ADEA "requires the employer to ignore an employee's age (absent a statutory exemption or defense); it does not specify *further* characteristics that an employer must also ignore," *id.* at 612 (emphasis in original)—goes far toward showing that the ADEA does not make such claims actionable.

As then-Justice Rehnquist observed 23 years ago, neutral employer decisions—including those with adverse effects on older workers—are not decisions made "because of" age within the meaning of Section 4(a); and the "reasonable factors other than age" provision in Section 4(f)(1) confirms that Congress "did not intend the ADEA to have the restraining influence" on employer decisionmaking that a disparate impact prohibition would have. *Markham v. Geller*, 451 U.S. 945, 948-49 (1981) (Rehnquist, J., dissenting from denial of *certiorari*). Rather, the ADEA embodies the Secretary of Labor's conclusion, reported to Congress, that enacting a prohibition on neutral decisions with adverse effects on older workers is "futile as public policy, and even contrary to the public interest," and that such employer practices and their adverse effects are better countered through non-coercive education, training, and manpower programs. *See* Report of the Secretary of Labor, *The Older American Worker: Age Discrimination in Employment* 21-25 (1965) (J.A. 77-89).

Contrary to petitioners (Pet. Br. at 2-4, 8, 11-17), *Griggs v. Duke Power Co.*, *supra*, and its progeny under Title VII do not call for an opposite reading of the ADEA. Those Title VII decisions do not hold that prohibitory provisions phrased like Section 703(a) of Title VII (or Section 4(a) of the ADEA) are generally to be read as providing for disparate impact claims. Rather, *Griggs* and its progeny rest on the proposition that it was proper to interpret Title VII as providing for certain disparate impact claims in order to accomplish Congress's objective of addressing the problems of race and gender discrimination in employment, as Congress understood those particular problems. That limited proposition about Title VII does not so much as throw a cross-light on the proper interpretation of the ADEA, which is a separate statute enacted —before *Griggs* was decided—for the separate purpose of meeting what Congress understood to be the distinctly different problem of age discrimination in employment.

Petitioners also err in suggesting (Pet. Br. at 2-3, 7-9, 30-36) that the Court should defer to the EEOC's view that the ADEA provides for disparate impact claims. The interpretive guideline that petitioners cite, 29 C.F.R. § 1625.7(d), is not an interpretation of Section 4(a)—the statutory provision at issue here—and does not affirmatively state that Section 4(a) provides for disparate impact claims. Rather, the guideline addresses Section 4(f)(1) and interprets that statutory provision (unreasonably) to require a showing of "business necessity" to establish that a neutral employer decision with an "adverse impact" on older workers is a decision based on "reasonable factors other than age." While the interpretive guideline apparently rests on the assumption that the ADEA provides for disparate impact claims, courts do not defer to agency assumptions but only to reasoned and lawful agency actions. Such a reasoned and lawful agency action is lacking here.

I. THE ADEA DOES NOT PROVIDE FOR DISPARATE IMPACT CLAIMS

A. The Text of the ADEA Does Not Recognize Disparate Impact Claims

Section 4(a) generally makes it unlawful for an employer:

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age . . . .

29 U.S.C. § 623(a). On its face and in context, this is a disparate treatment text.

1. Section 4(a) Is Naturally Read as a Disparate Treatment Prohibition

When the ADEA was passed, the "prevailing view" was that, to be unlawful, "discrimination required a purpose or motive to harm an individual because of [the individual's protected trait]"; no court or administrative agency had even suggested, much less ruled, that any anti-discrimination law provided for disparate impact claims. Alfred W. Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 Mich. L. Rev. 59, 69-71 (1972) [hereinafter "Blumrosen, *Strangers in Paradise*"]; *see also* Alfred W. Blumrosen, *Interpreting the ADEA: Intent or Impact*, in *Age Discrimination in Employment Act: A Compliance and Litigation Manual for Lawyers and Personnel Practitioners* 95 (Monte B. Lake ed., 1983) [hereinafter "Blumrosen, *Interpreting the ADEA: Intent or*

Impact"]; Arthur E. Bonfield, *The Substance of American Fair Employment Practices Legislation I: Employers*, 61 Nw. U. L. Rev. 907, 955-58, 970 (1967); Michael E. Gold, Griggs' *Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 Ind. Rel. L. J. 429, 518-20 (1985). Far from departing from this traditional conception, Section 4(a) is naturally read as a statutory statement of this "prevailing view" that provided only for disparate treatment claims.

a. Section 4(a)(1) applies to employer decisions to fail/refuse to hire an older worker, to discharge an older worker, or to discriminate against an older worker in setting terms of employment. Section 4(a)(2) applies to employer decisions to limit, segregate, or classify employees in a way that deprives an older worker of employment opportunities or that otherwise adversely affects an older worker's employment. But Sections 4(a)(1) and 4(a)(2) make such employer decisions unlawful only if taken "because of" age. This is discriminatory motive language.

A decision made "because of" a particular consideration is a decision made "by reason of" or "on account of" that consideration. *Webster's Third New Int'l Dictionary* 194 (1976). It is a decision that is "based on" or "motivated by" that particular consideration. *See Gen. Bldg. Contractors Ass'n*, 458 U.S. at 388-89 & n.15. Thus, as *Hazen Paper* held, Section 4(a)'s point in prohibiting decisions made "because of" age is both to put the focus on the employer's motivating purpose and to make it clear that the same decision is not unlawful—even if it has the same effect—if it is made for a non-age-based reason. *See Hazen Paper*, 507 U.S. at 609, 610-12; *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 281 (1989) (Kennedy, J., dissenting) ("By any normal understanding, the phrase 'because of' conveys the idea that the motive in question made a difference to the outcome.").

To put the point in familiar judicial terms, Section 4(a) makes it unlawful for an employer to make a decision "at least in part 'because of,' not merely 'in spite of,' its adverse effect upon" older workers. *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). It is not enough for a plaintiff to prove that an employer decision had an adverse effect on older workers (or that a different decision would have proven more advantageous for older workers). Rather, "'liability depends on whether the protected trait [*i.e.*, age] . . . actually motivated the employer's decision.'" *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000) (citations omitted).

b. It has been suggested that, since Section 4(a)(1)'s purpose is to state a broad disparate treatment prohibition, Section 4(a)(2)'s purpose must be to supplement Section 4(a)(1) by stating a disparate impact prohibition. But, as its history makes clear and its language demonstrates, Section 4(a)(2)'s purpose is to provide an employer analog to the similarly worded provision in Section 4(c)(2) that prohibits intentional age discrimination by labor organizations. *See* 29 U.S.C. § 623(c)(2) (it is "unlawful for a labor organization . . . to limit, segregate, or classify its membership . . . in any way which would deprive or tend to deprive any individual of employment opportunities . . . , because of such individual's age"); Michael E. Gold, *Disparate Impact Under the Age Discrimination in Employment Act of 1967*, 25 Berkeley J. Emp. & Lab. L. 1, 46-54, 72-73 (2004) (discussing origins of Section 4(a)(2)).

It has also been suggested that the first clause of Section 4(a)(2)—addressing decisions "to limit, segregate, or classify . . . in any way which would . . . adversely affect [an individual's] status as an employee"—makes unjustified adverse effects unlawful without regard to the employer's intent. But the first clause of Section 4(a)(2) standing alone—like the first clause of Section 4(a)(1) standing alone—does not state a liability standard at all. Rather, in each

instance, the first clause merely states one of the two necessary predicates for employer liability by delineating the kinds of adverse decisions to which Section 4(a) applies: In Section 4(a)(1), the listed practices are particular employer decisions which are by their nature adverse to an older worker (*e.g.*, failing or refusing to hire an older worker). And, in Section 4(a)(2), since employer decisions "to limit, segregate, or classify" are not decisions that by their nature are adverse to older workers, the listed practices are such decisions that "adversely affect [an individual's] status as an employee . . . ." In both instances, however, the statute sets a second predicate for liability—*i.e.*, that the employer has made the applicable decision, with its applicable "adverse[] [e]ffect," "because of such individual's age." In short, the first clause of Section 4(a)(2) does nothing to change the discriminatory motive requirement imposed by the "because of" language.

It has been further suggested that Section 4(a)(2)'s "because of" language should be read as a continuation of the "adversely affect" phrase in the preceding clause and that, so read, the section provides for disparate impact claims. But, as this Court has consistently recognized, the normal rule is that a comma between statutory clauses generally requires separating the language on either side. *See, e.g., Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 189 (1995); *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989). Accordingly, Section 4(a)(2)'s "because of" clause, which is set off by a comma from the first clause, is not properly read to continue the "adversely affect" phrase. Rather, the section's grammatical structure makes it plain that the "because of" clause refers to and modifies the first clause as a whole and thereby sets a discriminatory motive predicate for Section 4(a)(2) liability. *Accord DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 733 (3d Cir. 1995) (op. of Greenberg, J.); Pamela S. Krop, Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 Stan. L. Rev. 837, 843 & n.27 (1982).

Finally, it has been suggested that, since Section 4(a)(2)'s "because of" clause is phrased in the singular, it is improper to read the clause as referring to and modifying the first clause as a whole. But the section's first clause is phrased in both the plural (insofar as it refers to an employer decision "to limit, segregate, or classify his employees") and the singular (insofar as it refers only to a decision that "would deprive or tend to deprive any individual of employment opportunities . . . ."). It was therefore grammatically correct to phrase the "because of" clause in the singular, as it makes a claim actionable under Section 4(a)(2) only where the age of an individual (alone or with others) motivated the employer's decision, and the individual (alone or with others) was injured by the decision.

c. This reading of Section 4(a)(2) provides a natural congruence with Section 4(a)(1). Both provisions require that covered employer decisions be decisions made "because of" age in order to be unlawful. Both provisions, in other words, make intentional age discrimination—and only intentional age discrimination—unlawful.

2. The ADEA as a Whole Cuts Against Reading Section 4(a) as Providing for Disparate Impact Claims

Nothing else in the ADEA provides "convincing evidence" that Section 4(a) is to be read to provide for disparate impact claims. To the contrary, the remainder of the statute cuts against reading Section 4(a) as providing for disparate impact claims.

a. The ADEA simply cannot be said to enact a general prohibition on all employer decisions that adversely affect older workers. To the contrary, it only goes so far as to enact a carefully limited disparate treatment prohibition.

As originally enacted, the ADEA did not even apply to all individuals age 40 and over, but protected only those individuals age 40 to age 65. *See* 81 Stat. 602, 607.

Mandatory retirement programs were permissible, *see United Air Lines, Inc. v. McMann*, 434 U.S. 192, 203 (1977), as was age discrimination under a "bona fide employee benefit plan." *Ohio Pub. Employees Retirement Sys. v. Betts*, 492 U.S. 158, 176-82 (1989). Moreover, while the statute has since been amended to apply to employees age 40 or over, Section 4(a) does not apply to discrimination that favors an older worker over a younger one. *See General Dynamics Land Sys., Inc. v. Cline*, 124 S. Ct. 1236, 1239 (2004). Furthermore, the ADEA continues to permit mandatory retirement programs for firefighters, executives, and policymakers, *see* 29 U.S.C. §§ 623(j), 631(c), and permits age-based provisions in early retirement plans and benefit plans, *see id.* § 623(f)(2). Also, intentional discrimination is permissible where age is a "bona fide occupational qualification reasonably necessary to the normal operations" of a business. *Id.* § 623(f)(1). In short, the ADEA always has allowed much age-based decisionmaking.

Correlatively, "[t]he statute does not constrain employers from exercising significant other prerogatives and discretions in the course of the hiring, promoting, and discharging of their employees." *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 361 (1995). Section 4(f)(3) makes it lawful "to discharge or otherwise discipline an individual for good cause." 29 U.S.C. § 623(f)(3). Section 4(f)(2) makes it lawful "to observe the terms of a bona fide seniority system . . . ." *Id.* § 623(f)(2). And Section 4(f)(1) states that it shall be lawful "to take any action . . . where the differentiation is based on reasonable factors other than age." *Id.* § 623(f)(1).

These "various exemptions and affirmative defenses . . . illustrat[e] . . . [that] Congress recognized that not all age discrimination in employment is [the] 'arbitrary' [age discrimination]" that Congress determined should be prohibited. *Betts*, 492 U.S. at 176. Such a limited, nuanced scheme—directed only at "arbitrary" age discrimination—cuts

deeply against reading Section 4(a) as providing for disparate impact claims.

b. The "reasonable factors other than age" ("RFOA") provision in Section 4(f)(1) is particularly instructive in this regard. On the one hand, the RFOA provision "makes clear that '[t]he employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly.'" *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 88 (2000) (quoting *Hazen Paper*, 507 U.S. at 611). On the other hand, the RFOA provision "insure[s] that employers [a]re permitted to use neutral criteria not directly dependent on age." *EEOC v. Wyoming*, 460 U.S. 226, 232-33 (1983).

While the RFOA provision applies of its own force only where a differentiation is based on "reasonable factors" other than age, determining whether a decision "is based on" such factors is an inquiry that focuses on the employer's motive in making the decision. As petitioners are forced to recognize (Pet. Br. at 24), "[t]he RFOA provision uses language that *does* of necessity connote intentionality." By doing so, however, the RFOA provision confirms that Section 4(a) states only a disparate treatment prohibition.

The fundamental distinction between a disparate treatment liability theory and a disparate impact liability theory is that motive is dispositive in the former and irrelevant in the latter. While evidence of effects (statistical or otherwise) is admissible to prove either kind of claim, the employer's motives are determinative only in a disparate treatment case. In a disparate impact case, in contrast, the dispositive inquiry is whether an employment decision has a significant adverse effect on the protected class and, if so, whether the decision is demonstrably justified. Those are not inquiries into employer motive. Thus, the RFOA provision—by underlining the ADEA's insistence that employer motive is not merely relevant but outcome-determinative—belies the notion that the

ADEA provides for disparate impact claims. Such a motive-based inquiry is wholly inconsistent with a disparate impact regime. *See Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 670 (1989) (Stevens, J., dissenting) ("intent plays no role in the disparate-impact inquiry").

c. Sections 2 and 3 of the ADEA provide added context for Section 4 and do so in a manner that shows that Section 4(a) is only a disparate treatment prohibition.

Section 2(a) finds both that the "setting of arbitrary age limits regardless of potential for job performance has become a common practice," and that "certain otherwise desirable practices may work to the disadvantage of older persons," 29 U.S.C. § 621(a)(2); and it declares that the first of these—"arbitrary discrimination in employment because of age"—"burdens commerce and the free flow of goods," *id.* § 621(a)(4). Section 2(b) follows by stating two purposes of the ADEA: (i) "prohibit[ing] arbitrary age discrimination in employment," and (ii) "help[ing] employers and workers find ways of meeting problems arising from the impact of age on employment." *Id.* § 621(b).

Section 3 of the ADEA then addresses both the problem of "otherwise desirable practices [that] may work to the disadvantage of older persons"—including neutral practices with disproportionate adverse effects—and the statutory purpose of "help[ing] employers and workers find ways of meeting problems arising from the impact of age on employment." Section 3 charges the Secretary with undertaking research "with a view to reducing barriers to the employment of older persons, and the promotion of measures for utilizing their skills," 29 U.S.C. § 622(a)(1); requires the Secretary to publish "the findings of studies and other materials for the promotion of employment" of older workers, *id.* § 622(a)(2), and to foster programs for "expanding the opportunities and potentials of older persons," *see id.* § 622(a)(3); and requires the Secretary to increase educational

opportunities for older workers by "sponsor[ing] and assist[ing] State and community information and educational programs." *Id.* § 622(a)(4). Thus, Section 3 provides for a broad range of non-coercive measures aimed at alleviating, among other things, the adverse effects on older workers of neutral employer practices.

Section 4, in its turn, addresses the separate problem of employer practices that "set[] arbitrary age limits regardless of potential for job performance" and does so by prohibiting "arbitrary age discrimination in employment." Thus, in contrast to Section 3 and the problems of older workers that it addresses, Section 4's sole purpose is to make intentional age discrimination—*i.e.*, disparate adverse treatment of older workers "because of" age—unlawful.

B. The Legislative History Confirms that the ADEA Does Not Recognize Disparate Impact Claims

The legislative history of the ADEA "is a model of lucidity," and it also "drives the reader to the conclusion that 'intent' to discriminate on the basis of age was the gravamen of age discrimination and that actions which have 'adverse effect' on older workers were not to be considered illegal." Blumrosen, *Interpreting the ADEA: Intent or Impact*, at 73.

In passing Title VII, Congress "did not yet have enough information to make a considered judgment about the nature of age discrimination." *EEOC v. Wyoming*, 460 U.S. at 229. Congress therefore directed the Secretary of Labor to study the issue and make "such recommendations for legislation to prevent arbitrary discrimination in employment because of age as he determines advisable." Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, § 715, 78 Stat. 241, 265 (1964).

In a June 1965 report responding to that directive, the Secretary of Labor discussed "the entire range of factors which tend to have adverse effects on the employment of older workers." J.A. 42. The Secretary found that, unlike race

discrimination, age discrimination is not based upon animus or other "feelings about people entirely unrelated to their ability to do the job." J.A. 37; *see also id.* ("There is *no* significant discrimination of this kind so far as older workers are concerned."). He instead found that "[t]he most obvious kind of age discrimination in employment takes the form of employer policies of not hiring people over a certain age, without consideration of a particular applicant's individual qualifications." J.A. 44. This form of discrimination, he noted, is what the 1964 Congress had referred to as "arbitrary discrimination" in employment because of age. J.A. 37.

The Secretary added that the "force of certain circumstances," such as health problems, lower levels of education, and technological changes, "affect older workers more strongly, as a group, than they do younger workers." J.A. 57-66. In this regard, the Secretary noted that certain institutional arrangements such as pension and benefit plans could adversely affect older workers, sometimes by leading employers to refuse to hire older workers. J.A. 38, 66-73. But the "firmest conclusion" from the Secretary's study was that "the most serious barriers to the employment of older workers are erected on just enough basis of fact to make it futile as public policy, and even contrary to the public interest, to conceive of all age restrictions as 'arbitrary' . . . ." J.A. 77-78. The Secretary recommended that institutional arrangements and neutral practices disadvantaging older workers be addressed through pension reforms, J.A. 80-81, counseling, job placement, and job training programs, J.A. 82-85, and a system of continuing education, J.A. 85-89.

On January 23, 1967, the Secretary sent proposed legislation to Congress. Letter from W. Willard Wirtz to Hon. John W. McCormack and Hon. Hubert H. Humphrey, Jan. 23, 1967, *reprinted in* EEOC, *Legislative History of the Age Discrimination in Employment Act* 62-63 (1981) [hereinafter "*EEOC Legislative History*"]. The Secretary stated that, while

the proposed bill "provides for attention to be given to institutional arrangements which work to the disadvantage of older workers," "[r]easonable differentiations not based solely on age . . . would not fall within the proscription" of the legislation. *Id.* Rather, "[r]esearch would be undertaken and promoted with a view to reducing barriers to the employment of older workers." *Id.*

The Secretary explained that his bill addressed only "the 'unjust' or 'arbitrary' . . . discrimination . . . which may be made in the absence of any legitimate relevance between age and employment capacity." *Hearings on S. 830 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare,* 90th Cong. 37 (1967) (internal quotation marks omitted). The Secretary indicated that, where there was "legitimate relevance," even "differentiations or distinctions" involving consideration of age were permitted. *Id.* This limitation was "identified specifically in Section 2(b)" of the bill and "reflected particularly in Section 4(f)," which provided that there was no violation "*where age is a bona fide occupational qualification*" or "*where the differentiation is based on reasonable factors other than age.*" *Id.* at 39 (emphasis in original).

The ADEA is in essence the Secretary's proposed bill. *See EEOC Legislative History* at 173. The findings and purposes in Section 2 were enacted as the Secretary proposed, as were the education and research programs in Section 3, the prohibitions in Section 4(a), and the RFOA provision in Section 4(f)(1). *Compare id.* at 68 *with* 81 Stat. 602-03. Both committee reports acknowledge the Secretary's proposals and rely upon them. *See id.* at 74-76, 106-07.

This legislative history confirms that the ADEA does not provide for disparate impact claims. In making his sweeping inquiry, the Secretary gave detailed consideration to neutral employer practices that have adverse effects on older workers. The Secretary concluded that such practices could *not* properly

be described as "age discrimination" and that only "arbitrary age discrimination" warranted prohibition. The Secretary recommended that other problems facing older workers be dealt with through education, job placement, and training measures. As Congress enacted the very language that the Secretary proposed, there is no basis for inferring that Congress had a different intent. *Accord EEOC v. Wyoming*, 460 U.S. at 230-31.

C. Important Pragmatic Considerations Cut Against Reading the ADEA to Provide for Disparate Impact Claims

Although the text and legislative history of the ADEA are dispositive, important pragmatic reasons also cut against reading the ADEA to provide for disparate impact claims. On an operational level, the ADEA is ill-suited for such claims.

1. In Title VII cases, disparate impact claims have traditionally been tried to courts, not juries. Thus, in 1991, when Congress authorized jury trials under Title VII, it expressly excluded disparate impact claims from that authorization. *See* 42 U.S.C. § 1981a(a)(1) & (c).

In contrast, Section 7(c) of the ADEA specifically provides without any limitation that "a person shall be entitled to a trial by jury of any issue of fact in any [ADEA] action . . . regardless of whether equitable relief is sought by any party in such action." 29 U.S.C. § 626(c)(2). Where disparate impact claims have been allowed, those cases have been tried to juries. *See, e.g., Allen v. Entergy Corp.*, 193 F.3d 1010, 1013-15 (8th Cir. 1999); *AFSCME, Dist. Council 37 v. New York City Dep't of Parks & Recreation*, 113 F.3d 347, 354-56 (2d Cir. 1997); *Criswell v. Western Airlines, Inc.*, 709 F.2d 544, 547 (9th Cir. 1983), *aff'd on other grounds*, 472 U.S. 400 (1985).

But, as Title VII's scheme suggests, disparate impact claims do not fit well with a jury trial approach. Factual

questions about discriminatory intent are "typical grist for a jury's judgment." *Teamsters v. Terry*, 494 U.S. 558, 583 (1990) (op. of Stevens, J.). But the complex evaluative judgments made in disparate impact cases—about, *e.g.*, differential rates of selection, validity of selection practices, and effective alternative selection practices—plainly are not. *See* Mack A. Player, *Title VII Impact Analysis Applied to the Age Discrimination in Employment Act: Is a Transplant Appropriate?*, 14 U. Tol. L. Rev. 1261, 1272 (1983) [hereinafter "Player, *Title VII Transplant*"]; Douglas Herbert & Lani Shelton, *A Pragmatic Argument Against Applying the Disparate Impact Doctrine in Age Discrimination Cases*, 37 S. Tex. L. Rev. 625, 652-56 (1996). Moreover, "the jury instructions that they will be given will be difficult, if not impossible, to follow." *Id.* at 657. In short, the "practical abilities and limitations of juries" that could "impair the functioning of [a] legislative scheme" providing for disparate impact claims counsel against recognizing such claims. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 n.4 (1989) (internal quotation marks omitted).

2. Furthermore, in Title VII cases, disparate impact claims are usually pursued as Rule 23(b)(2) class actions. Because such claims challenge practices generally applicable to a group and can be remedied by common equitable relief, Title VII disparate impact cases are the "prime examples" of cases where individualized notice and an opportunity to opt out are neither necessary nor appropriate. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997).

In contrast, Rule 23(b)(2) does not apply to ADEA claims. Such claims are subject to the "opt-in" procedures established in 29 U.S.C. § 216(b). *See* 29 U.S.C. § 626(b).

While the ADEA "opt-in" procedures allow older worker plaintiffs to group their resources, they do not allow "representative" actions, much less ones without notice or an opportunity to opt out. *See Hoffmann-La Roche Inc. v.*

Sperling, 493 U.S. 165, 170, 173-74 (1989). Thus, there is no mechanism for ensuring class-wide participation in ADEA disparate impact claims; the courts have no power to bind all affected to common equitable relief; and "repetitive" litigation imposing inconsistent obligations is entirely possible. Player, *Title VII Transplant*, at 1272-73. These procedural differences add to the showing that the ADEA is ill-suited for disparate impact claims.

3. In the ADEA context, there also is no satisfactory calculus for measuring disparate impact. In the Title VII context, race, sex, national origin, and religion are basically dichotomous variables and the effects of a selection practice on blacks versus non-blacks, Hispanics versus non-Hispanics, females versus males, *etc.*, is relatively straightforward to measure. In contrast, "age is a continuum," *Goldstein v. Manhattan Indus., Inc.*, 758 F.2d 1435, 1442 (11th Cir. 1985), and "impact analysis that works well with finite classes like race and sex does not quite fit with a fluid, continuum concept such as age." Mack A. Player, *Wards Cove Packing or Not Wards Cove Packing? That Is Not the Question: Some Thoughts on Impact Analysis Under the Age Discrimination in Employment Act*, 31 U. Rich. L. Rev. 819, 829 (1997) [hereinafter "Player, *Impact Analysis Under the ADEA*"].

One possible approach would allow plaintiffs to specify the applicable groupings on a case-by-case basis (*e.g.*, workers age 50 and over versus under age 50). But such an approach is subject to manipulation and provides no standards for self-examination and voluntary compliance. *See Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364, 1371-73 (2d Cir. 1989); Player, *Impact Analysis Under the ADEA*, at 829-30. For example, on this approach, "an 85 year old plaintiff could seek to prove a discrimination claim by showing that a hiring practice caused a disparate impact on the 'sub-group' of those age 85 and above, even though all those hired were in their late seventies." *Lowe*, 886 F.2d at 1373.

A second, less manipulable approach is to specify the groupings as individuals age 40 and over versus those under age 40. *See Lowe*, 886 F.2d at 1371-73. But this more categorical approach is in tension with this Court's observation that the ADEA "prohibits discrimination on the basis of age and not class membership." *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 313 (1996). Thus, a number of the lower courts have rejected it. *See* Tom Lee *et al.*, *Lindemann & Grossman's Employment Discrimination Law* 447 & n.197 (3d ed. Supp. 2002).

In any event, neither approach solves the problem posed by the transient nature of age. Age is not merely a continuous variable; it is also a changing one. An individual not covered by the ADEA at age 39 becomes protected by the statute the next year; and an individual under age 40 (or age 50 or age 55 or age 60) may age sufficiently to move into a different comparison group over the course of litigation. Thus, "[t]he attempt to define 'aged persons' as all persons over 40 makes sense as an effort to wipe out specific age limits, but not as creating a 'protected class' like race or sex, precisely because of the transient composition of the group." Blumrosen, *Interpreting the ADEA: Intent or Impact*, at 104.

4. Evidence that an employer decision that is neutral on its face has adverse effects on older workers also lacks the probative significance that such evidence has in race and sex discrimination cases. Although it may be idealistic in some ways, *see Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 992 (1988) (op. of O'Connor, J.), the working assumption of Title VII law is that, "absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307 (1977). On this assumption, a statistical showing that a neutral employer decision produces

a deviation from the norm is taken as a significant signal that the employer practice is problematic (without evidence of justification). But this assumption has no conceivable application to younger and older workers and, accordingly, "statistics showing a deviation from such a 'norm' would not prove anything in the ADEA context . . . ." Blumrosen, *Interpreting the ADEA: Intent or Impact*, at 110.

As this Court has noted, "physical ability generally declines with age." *Mass. Bd. of Retir. v. Murgia*, 427 U.S. 307, 315 (1976). Furthermore, "mental capacity sometimes diminish[es] with age." *Gregory v. Ashcroft*, 501 U.S. 452, 472 (1991). In addition, older persons have less incentive than younger persons to invest in human capital and tend statistically to have more dated and less valuable technological skills and/or education. *See* Richard A. Posner, *Aging and Old Age* 51-58 (1995). And, while age frequently brings with it more experience and wisdom, *see id.* at 105-06, in many occupations and professions, age is negatively correlated with performance and interest. *See, e.g., id.* at 72-78, 115-17, 358-60. Consequently, in contrast to race and gender, "'non-age factors having differential age-specific impacts'" are likely to be "'ubiquitous and inescapable.'" *Cunningham v. Cent. Beverage, Inc.*, 486 F. Supp. 59, 62 (N.D. Tex. 1980) (quoting Peter H. Schuck, *The Graying of Civil Rights Law: The Age Discrimination Act of 1975*, 89 Yale L.J. 27, 65 (1979)).

As the Secretary of Labor noted (J.A. 68-73), some neutral decisions adversely affect older workers as long-term workers who have gained a more advantageous status than younger, shorter-term workers. For example, "virtually all elements of a standard compensation package are positively correlated with age." *Finnegan v. Trans World Airlines, Inc.*, 967 F.2d 1161, 1164 (7th Cir. 1992). Thus, salary caps in payroll systems (such as those employed by federal and state governments) adversely affect annual percentage pay increases statistically available for older workers. *See EEOC v. Governor Mifflin*

Sch. Dist., 623 F. Supp. 734, 743 (E.D. Pa. 1985). Moreover, in tough times, across-the-board cuts in, for example, wages and/or vacation leave have adverse effects on older workers. *Finnegan*, 967 F.2d at 1164. And a decision to "close a plant or curtail its operations on the basis of high wage costs" will do so as well. *Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1214 (7th Cir. 1987) (Easterbrook, J., dissenting).

The facts here illustrate the point. Petitioners complain that officers age 40 and over generally received lower initial percentage pay increases. However, officers age 40 and over were generally in *higher* ranked positions and generally received *higher* salaries both before and after the initial increases. The alleged disparate impact derives from the older workers' prior advantageous status.

In short, it is to be expected that many sound and efficacious work, selection, and compensation practices will have a disproportionate adverse impact on older workers—*e.g.*, in physically demanding jobs and in jobs requiring cutting-edge computer skills. Since such adverse effects are so predictable and yet so unavoidable, it is not appropriate to equate a showing that a facially neutral practice has a disparate impact on older workers with a *prima facie* case of unlawful age discrimination and in effect "force employers to carry the burden of justifying virtually all of their work and selection standards." Player, *Impact Analysis Under the ADEA*, at 830. As Justice Breyer has commented, "there [are] so many rules correlated with age . . . that how could the employer run his business where you are going to have a court second-guessing every single rule that's correlated with age. That's the problem." Tr. of Oral Argument at 17, *Adams v. Florida Power Corp.*, No. 01-584 (U.S. March 20, 2002), *available at* www.supremecourtus.gov/oral_arguments/argument_transcripts/01-584.pdf.

Contrary to petitioners' argument (Pet. Br. at 10 & n.4), that problem is not solved by speculative predictions that, in ADEA cases, employers will more frequently succeed in carrying the burden of justifying their neutral practices. Litigation (involving expensive psychometric studies and testimony) that is not likely to be successful has little or no social utility and should not be encouraged. Further, as petitioners have noted (Pet. 9-10 n.3), "the potential exposure to liability under the ADEA affects employers' decisions in designing their employment policies, meaning that the law's impact cannot be measured in terms of . . . litigated cases alone." Indeed, as a respected industrial psychologist has noted: "In the aggregate, heightened probabilities for excellence are not a function of the validity of any particular selection device. Rather, they are a result of a total situation in which vast numbers of employers are free to experiment with an unlimited number of possible qualitative requirements, discarding those that seem unsatisfactory and replacing them with others that seem more promising, and so on and on, in a continuing, open-ended process." Barbara Lerner, Washington v. Davis: *Quantity, Quality and Equality in Employment Testing*, 1976 Sup. Ct. Rev. 263, 304-05. Yet, by allowing myriad employment practices that correlate with age to be challenged without more, an ADEA disparate impact regime could only retard this search for excellence and, in the process, force employers to abandon sound selection practices and/or to move toward quotas. *See Wards Cove*, 490 U.S. at 652-53; *Watson*, 487 U.S. at 991-92 (op. of O'Connor, J.).

The sum of the matter is that, while statistical disparities concerning minorities and women may tend to identify potentially problematic employment practices, such statistics are not likely to do so where older workers are concerned, since so many sound employment practices are and always will be adversely correlated with age. It just is neither practical nor constructive to allow a *prima facie* case of age discrimination to be based on correlations that prove so little and that are so

frequent and unavoidable. There certainly is no "convincing evidence" that the ADEA is intended to do so.

II. *GRIGGS* AND ITS PROGENY UNDER TITLE VII DO NOT SUPPORT RECOGNITION OF ADEA DISPARATE IMPACT CLAIMS

As petitioners concede (Pet. 6-7), the majority of circuits to address the issue have held that the ADEA does not recognize disparate impact claims. Echoing the minority view, however, petitioners argue (Pet. Br. at 4-5, 11-17, 22) that Section 4(a)(2) of the ADEA was derived from and is similarly worded to Section 703(a)(2) of Title VII; that *Griggs* and its progeny have construed Title VII to provide for certain race/sex disparate impact claims; and that the ADEA should therefore be construed to provide for older worker disparate impact claims. This argument does not withstand scrutiny.

First, it is plain that the 1967 Congress did not follow Section 703(a)'s language in drafting Section 4(a) in order to provide for ADEA disparate impact claims. As noted above (*supra*, at 7-8), in 1967, the prevailing conception was that anti-discrimination provisions required proof of discriminatory motive; and, as of 1967, the "disparate impact" doctrine had not been formulated by any court, enforcement agency, or even academic literature. The pathbreaking construction of Title VII in *Griggs* to recognize certain disparate impact claims did not issue until 1971. Since this later construction of Section 703(a) was not one that reflected "a well-known meaning at common law or in the law of this country" at the time of the ADEA's enactment, *Standard Oil Co. v. United States*, 221 U.S. 1, 59 (1911), there is no proper basis for concluding that the 1967 Congress specifically intended to incorporate the disparate impact construction of Title VII into the ADEA.

Second, it is equally plain that the textual similarity of Section 703(a) of Title VII and Section 4(a) of the ADEA does not call for recognition of ADEA disparate impact claims.

While the "presumption of uniform usage" is a venerable principle of construction, that presumption clearly gives way here.

a. As this Court has stated, the "presumption of uniform usage" "is not rigid and readily yields" to other indicia of statutory meaning. *General Dynamics*, 124 S. Ct. at 1245. For example, "[w]here the subject matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and of the circumstances under which the language was employed." *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932). For these reasons, the United States Reports are replete with cases giving similar language in two statutes (and even within the same statute) different meanings.

For example, in *General Dynamics*, in addition to finding that the word "age" has different meanings within different sections of the ADEA, 124 S. Ct. at 1246-47, the Court held that the phrase "because of . . . age" has a different scope than the phrase "because of . . . race . . . [or] sex" in Title VII. *Id.* The Court found that "age" "can be readily understood either as pointing to any number of years lived, or as common shorthand for the longer span and concurrent aches that make youth look good." *Id.* at 1246. In contrast, the Court found that "'[r]ace' and 'sex' are general terms that in every day usage require modifiers to indicate any relatively narrow application." *Id.* at 1247. The Court thus found that cases construing Title VII's prohibitions as applying broadly to distinctions that hurt persons of all races and genders were inappropriate as a guide to construing the ADEA's prohibitions; the Court held that "the prohibition of age

discrimination is readily read more narrowly" to apply only to "distinctions that hurt older people." *Id.*

Similarly, in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 523-25 (1994), the Court construed the attorney's fee provision of the Copyright Act, 17 U.S.C. § 505, to provide a single standard covering both prevailing plaintiffs and defendants, even though the Court had adopted a dual standard in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), when construing virtually identical language in Title VII. The Court noted that "Congress, in enacting § 505 of the 1976 Copyright Act, could not have been aware of the *Christiansburg* dual standard as *Christiansburg* was not decided until 1978." 510 U.S. at 523 n.9. The Court also noted that *Christiansburg* was based on "policy considerations" and "legislative history" that the Court found "not completely similar" in the Copyright Act. *Id.* at 523, 524. Thus, the Court held that the "argument based on our fee-shifting decisions under the Civil Rights Act must fail." *Id.* at 525 (footnote omitted).

More recently, in *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200 (2001), the Court construed a provision of the Social Security Act to provide that, in computing Social Security taxes on "wages paid," backpay awards should be attributed to the period during which they were actually paid, even though the Court had previously interpreted a similarly worded provision as attributing backpay, in determining eligibility for Social Security benefits, to the period during which the corresponding wages should have been paid. The Court explained that its holding in *Social Security Board v. Nierotko*, 327 U.S. 358 (1946), to the latter effect had been grounded on a "concern that the benefits scheme . . . would be disserved by allowing an employer's wrongdoing" to undermine an employee's eligibility for benefits. *Cleveland Indians*, 532 U.S. at 212. Because "[n]o similar concern underlies the tax provisions," the Court held

that *Nierotko* "does not compel symmetrical construction of the 'wages paid' language." *Id.* at 212, 213.

b. Here, it bears emphasis that Congress chose not to add an age discrimination prohibition to Title VII, but rather enacted a separate and distinct statute from the one construed in *Griggs* and its progeny. Although the ADEA and Title VII have some similar language, they are also distinct in many respects; and all of the factors that caused *General Dynamics*, *Fogerty*, and *Cleveland Indians* to conclude that the presumption of uniform usage must yield are present here as well: Specifically, as even petitioners concede (Pet. Br. at 15-17), the Court has not applied Title VII precedent in ADEA cases where the pertinent language of the two statutes differs; and *General Dynamics* establishes that the pertinent prohibitory language in the ADEA is different and narrower than the analogous but broader prohibitory language in Title VII. Moreover, as in *Fogerty*, the ADEA was enacted before *Griggs* and its progeny were decided and at a time when unjustified disparate impact was not a recognized concept of unlawful discrimination. And, most importantly, as in *Fogerty* and *Cleveland Indians*, the Court here faces prior precedent that, as shown below, rests not so much on the allegedly comparable language but on the different and broader "objectives underlying Congress' enactment of Title VII." *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1008 n.13 (10th Cir. 1996); *DiBiase*, 48 F.3d at 734 (op. of Greenberg, J.); Michael C. Sloan, Comment, *Disparate Impact in the Age Discrimination in Employment Act: Will the Supreme Court Permit It?*, 1995 Wis. L. Rev. 507, 517. Indeed, the differences in legislative objectives in Title VII and the ADEA and in the concerns that each statute addresses are so deep as to preclude a symmetrical construction of the ADEA to accord with the construction of Title VII in *Griggs*.

Contrary to the impression that petitioners seek to convey (Pet. Br. at 4, 8, 11-12, 22), *Griggs* and its progeny did not

derive authorization for disparate impact claims strictly from Title VII's text, much less suggest that Section 703(a) is naturally read to state a disparate impact prohibition. Although *Griggs* quotes the statutory text in a footnote, it does not thereafter discuss or analyze that text. Rather, *Griggs* derives its holding that Title VII provides for certain racial disparate impact claims from "[t]he objective of Congress in the enactment of Title VII . . . to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." 401 U.S. at 429-30. While the Court found this objective "plain from the language of the statute," *id.* at 429, it did not state that the authorization for disparate impact claims was derived solely or even primarily from the language. Nor did the progeny of *Griggs*, which confirm that Title VII's objectives played a crucial role in the Court's interpretive analysis. *See, e.g.*, *Connecticut v. Teal*, 457 U.S. 440, 448 (1982); *Watson*, 487 U.S. at 990-91.

Specifically, *Griggs* held that "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the *status quo* of prior discriminatory employment practices." 401 U.S. at 430. *Griggs* was concerned that "childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their life." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 806 (1973). Similarly, in determining to extend disparate impact analysis to gender cases, *Dothard v. Rawlinson*, 433 U.S. 321, 329-32 (1977), the Court was confronted with another class (women) that has been historically subject to invidious discrimination and that could cumulatively suffer from actions based on largely immutable characteristics.

The prohibitions of the ADEA, in contrast, were not enacted to address any such broad concern with cumulative disabilities resulting from historic discrimination. The prohibitions of the ADEA are intended to address the distinct problem of arbitrary age discrimination in employment—a problem that, as the Secretary of Labor reported, is different and more limited than the problem of race and sex discrimination in employment.

Specifically, as this Court has observed, "unlike . . . those who have been discriminated against on the basis of race or national origin," or gender, older persons as a class "have not experienced a 'history of purposeful unequal treatment,' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Murgia*, 427 U.S. at 313; *accord Kimel*, 528 U.S. at 83. Where older workers (who of course were once young) are concerned, the lack of a diploma, test score, or skill "cannot be viewed as a product of lifelong discrimination." Krop, 34 Stan. L. Rev. at 850. Older workers as a class have not been educated in segregated schools, been subject to Jim Crow laws, been relegated to menial support jobs, or been barred from workplaces entirely. Rather, as the Secretary of Labor reported to Congress, for older workers, the issue is usually not the denial of skills or opportunity in the first instance or the cumulation of burdens over a lifetime, but the general (albeit uneven) deterioration of skills and performance with advancing age and the consequential tendency of employers to use age as a proxy for measuring an individual's abilities at a particular point in time. J.A. 37, 42-57.

The Court has indicated that disparate impact claims are also intended to address the "problem of subconscious stereotypes and prejudices . . . that Title VII was enacted to combat." *Watson*, 487 U.S. at 990. But "the kind of 'we-they' thinking that fosters racial, ethnic, and sexual discrimination is unlikely to play a large role in the treatment of the elderly

worker," "because the people who do the hiring and firing are generally as old as the people they hire and fire and are therefore unlikely to mistake those people's vocational abilities." Posner, *supra*, at 320-21. The Secretary thus reported to Congress that "age discrimination rarely was based on the sort of animus motivating some other forms of discrimination," *EEOC v. Wyoming*, 460 U.S. at 231; J.A. 37, 43-44, where prejudices having no relation to employment may cause erroneous judgments. *See Murgia*, 427 U.S. at 313. Rather, the Secretary reported that age discrimination results from generalizations about work abilities that, although statistically true, may not be applicable to particular individuals. J.A. 37, 42-57. Accordingly, as *Hazen Paper* held in the context of the ADEA, "[w]hen the employer's decision *is* wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age . . . ." 507 U.S. at 611 (emphasis in original).

In short, contrary to petitioners' suggestion (Pet. Br. at 13-14 & n.8), the concerns that led to the enactment of Title VII and that framed the construction of Title VII in *Griggs* are not the concerns that led to the enactment of the ADEA's prohibitions on age discrimination or that the ADEA's prohibitions are aimed at addressing. As this Court recognized in *EEOC v. Wyoming*, 460 U.S. at 230-31, the ADEA addresses a different and more limited form of discrimination than does Title VII; and, accordingly, in cases like *General Dynamics* and *Betts*, the Court has held that the ADEA has a narrower prohibition that serves a more limited purpose. Indeed, as discussed above (*supra*, at 15-18), the Secretary expressly recommended that neutral practices with adverse effects on older workers not be prohibited but rather be addressed by non-coercive governmental measures. The presumption in favor of uniform usage has no proper application in such circumstances and, accordingly, the Court should decline to read Title VII's disparate impact doctrine

into the ADEA. Justice Stevens' comment that "there is sufficient individuality and complexity to [Title VII], and to the regulations promulgated under it, to make it inappropriate simply to transplant [Title VII's] standards . . . into a different statutory scheme having a different history," *Washington v. Davis*, 426 U.S. at 255 (Stevens, J., concurring), is very much to the point here. *Accord Hazen Paper*, 507 U.S. at 618 (Kennedy, J., concurring) ("there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA").

In all events, as in *General Dynamics*, there is here a further textual difference between the ADEA and Title VII that requires the presumption of uniform usage to yield. As the court below recognized (Pet. App. 17a-18a), the RFOA provision in Section 4(f)(1) is "a clear textual difference between the ADEA and Title VII regarding employer liability—a distinction that, if nothing else, plainly contradicts the argument that the cognizability of a disparate impact claim under Title VII . . . controls the cognizability of a disparate impact claim under the ADEA." The Court's Title VII cases themselves show that *Griggs* and its progeny give way to statutory provisions like the ADEA's RFOA provision.

In its Title VII cases, the Court has said that disparate impact claims will lie only "in some circumstances" (*Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 136-37 (1976)), and only "in certain cases" (*Watson*, 487 U.S. at 986-87, 988). The Court, for example, has declined to decide whether such claims lie under Section 703(a)(1), the Title VII provision applicable to employers' *compensation* decisions—which is the type of decision challenged here. *See Nashville Gas Co. v. Satty*, 434 U.S. 136, 144-45 (1977). Moreover, noting that "[e]ven a completely neutral practice will inevitably have *some* disproportionate impact on one group or another," the Court has added that "*Griggs* does not imply, and this Court has never held, that discrimination must always be inferred from

such consequences." *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 710-11 n.20 (1978) (emphasis in original).

Indeed, the Court has found that *Griggs* does not apply where Title VII as a whole provides only for disparate treatment claims. For example, Section 703(h) of Title VII makes it lawful to "apply . . . different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, . . . provided that such differences are not the result of an intention to discriminate . . . ." 42 U.S.C. § 2000e-2(h). "Under § 703(h), the fact that a seniority system has a discriminatory impact is not alone sufficient to invalidate the system; actual intent to discriminate must be proved." *See Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 65, 69 (1982).

The Court has likewise suggested that the Bennett Amendment to Title VII, which allows wage differentiations "authorized by the provisions of section 206(d) of title 29," 42 U.S.C. § 2000e-2(h), precludes disparate impact claims for gender-correlated wage disparities. *See County of Washington v. Gunther*, 452 U.S. 161, 170-71 (1981). And the Court has held that a disparate impact claim by male employees against a gender-neutral pension plan would be barred by 29 U.S.C. § 206(d), which makes lawful compensation disparities based on "any other factor other than sex." *See Manhart*, 435 U.S. at 710-11 n.20.

Like Section 703(h) and 29 U.S.C. § 206(d) in their particular areas of application, Section 4(f)(1) of the ADEA makes intent outcome-determinative and, in its instance, does so on a statute-wide basis. Thus, Section 4(f)(1) provides yet another ground against transferring the *Griggs* disparate impact construction of Title VII into the ADEA.

III. PETITIONERS' ARGUMENT THAT THE ADEA'S TEXT AND LEGISLATIVE PURPOSES INDEPENDENTLY SUPPORT RECOGNITION OF DISPARATE IMPACT CLAIMS IS IN ERROR

Petitioners' fallback from their argument for a symmetrical construction of Title VII and the ADEA is (Pet. Br. at 8-9, 17-29) that an "independent examination" of the ADEA's text and legislative purposes supports recognition of disparate impact claims. Not even the courts that have approved ADEA disparate impact claims have accepted the erroneous arguments that petitioners offer in this regard.

A. The Text of the ADEA Does Not Support Recognition of Disparate Impact Claims

Petitioners advance two principal textual arguments: First, they suggest (Pet. Br. at 19) that the RFOA "provision necessarily implies that it is possible to violate section 4(a) through differentiation based on a factor other than age—that is, without having a discriminatory purpose." Second, they suggest (Pet. Br. at 22) that "the phrase 'because of'—unlike such terms as 'willfully,' or 'purposefully,' or 'knowingly'—does not refer to an actor's state of mind in all (or even most) contexts, including in the ADEA. Rather, it refers to causation." Neither suggestion is sound.

1. Petitioners' RFOA argument proceeds from the premise (Pet. Br. at 17-21) that, unless the RFOA provision is read as a basis for implying that Section 4(a) provides for disparate impact claims, the RFOA provision has no operative meaning and effect. That premise is wrong.

As the courts of appeals have long held, in a disparate treatment case, the RFOA provision confirms that an action is lawful where the employer's explanation is not a "pretext" for intentional discrimination. *See, e.g.*, *Schwager v. Sun Oil Co.*, 591 F.2d 58, 61 (10th Cir. 1979); *Crimm v. Missouri Pac. R.R. Co.*, 750 F.2d 703, 712 (8th Cir. 1984); *Krieg v. Paul Revere Life Ins. Co.*, 718 F.2d 998, 999 (11th Cir. 1983) (*per curiam*); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1016 (1st Cir. 1979); *Bittar v. Air Canada*, 512 F.2d 582, 582-83 (5th Cir. 1975). In this same vein, the courts of appeals have also construed the RFOA provision to provide the ADEA's answer to the question raised by mixed-motive cases; as Judge J. Skelly Wright wrote for the D.C. Circuit in an oft-cited decision:

> Differentiation "because of" age is unlawful, but not differentiation attributable to "reasonable factors other than age." A transgression arises only if age contributed to the employer's action—so that the differential cannot be ascribed to influences "other" than age. If age is what tips the scale in an adverse employment decision, a violation of the Act has occurred. Conversely, if reasonable and lawful factors dictate and support the employer's decision, additional consciousness of age is not itself interdicted by the Act. The courts agree that age need not be the sole factor, or even the most compelling; it simply must be a consideration that made a difference in shaping the outcome.

Cuddy v. Carmen, 694 F.2d 853, 858 n.23 (D.C Cir. 1982) (citations omitted). In short, the RFOA provision has the meaning and effect of "insur[ing] that employers [are] permitted to use neutral criteria not directly dependent on age." *EEOC v. Wyoming*, 460 U.S. at 232-33.

That the RFOA provision applies only to actions "otherwise prohibited" by Section 4(a) does not provide a proper basis for construing Section 4(a) as providing for disparate impact claims. The statutory phrase is "otherwise prohibited," not "prohibited," and the word "otherwise" means "in other respects." *Webster's Third New Int'l Dictionary* 1598. Accordingly, the phrase "otherwise prohibited" at most refers to employer decisions that, on their face and without further explanation, could be deemed ADEA violations. The reference, in other words, would be to a traditional "pretext"

case, once the *prima facie* case is made, if the defendant did not show a legitimate non-discriminatory reason for its action. *See Reeves*, 530 U.S. at 142-43. The reference would also be to a mixed-motive case, once the plaintiff showed that an illegitimate factor had actually played a role in the decision, if the defendant did not show that the same decision would have resulted from legitimate considerations. *See Desert Palace, Inc., v. Costa*, 539 U.S. 90, 93 (2003). So, as the courts of appeals have held, in both "pretext" and mixed-motive cases, the RFOA provision confirms that an action "otherwise prohibited" is lawful if the action was nonetheless based on "reasonable factors other than age." No disparate impact claims need be implied. Indeed, the RFOA provision also applies to "any action otherwise prohibited under subsection[] . . . (e)," and subsection (e) covers only actions "based on age," 29 U.S.C. § 623(e), and accordingly, the "otherwise prohibited" language necessarily refers to circumstances where the employer acted with allegedly discriminatory intent.

Nor does the RFOA provision's use of the term "reasonable" fairly suggest that Section 4(a) provides for disparate impact claims. While the term "reasonable" has many usages, one accepted use is to refer to something that is "[a]ccording to reason," *Black's Law Dictionary* 1293 (8th ed. 2004), or "using or showing reason," *Webster's New World Dictionary* 1183 (2d college ed. 1979). That was the usage in equal protection law at the time of the ADEA's enactment. *See, e.g., Gallagher v. Crown Kosher Super Market, Inc.*, 366 U.S. 617, 624 (1961) (a "classification having some *reasonable basis* does not offend against the equal protection clause") (emphasis added); *McGowan v. Maryland*, 366 U.S. 420, 428 (1961) (finding no equal protection violation because there was "no indication of the *unreasonableness* of this differentiation") (emphasis added). Not surprisingly, in its disparate treatment and mixed-motive cases, the Court uses the term "reasonable" and analogous modifiers in this same way. *See, e.g., McDonnell Douglas*, 411 U.S. at 802-03 (employer

must offer a "*reasonable* basis" for rejection of applicant) (emphasis added); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978) (defendant must offer "proof of a justification which is *reasonably related* to the achievement of some legitimate goal") (emphasis added); *Desert Palace*, 539 U.S. at 93 ("legitimate" reasons required); *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 399-400 (1983) ("wholly permissible" or "valid" reasons required). This Court has previously said that such modifiers ordinarily should not be understood to add substantive restrictions beyond the basic requirement of a rational, non-discriminatory intent. *See Hazen Paper*, 507 U.S. at 612. And, in the context of the ADEA, it is clear that the term "reasonable" in the RFOA provision, rather than requiring more than a reasonable grounding for an allegedly rational, non-discriminatory decision, is simply the contrasting antonym to the term "arbitrary" that modifies the concept of "age discrimination" referenced in Section 2 (and the legislative history) and prohibited by Section 4(a). In short, petitioners' protest (Pet. Br. at 9, 19-20) that, unless ADEA disparate impact claims are cognizable, the term "reasonable" in the RFOA provision becomes meaningless surplusage, is wholly without substance.

In any event, the Court has expressed a healthy skepticism about reading major theories of liability into statutes "through negative inferences drawn from . . . provisions of quite limited effect," *Landgraf v. USI Film Prods.*, 511 U.S. 244, 259-62 (1994), and the court below was thus quite right to "decline to infer from the inclusion of the word 'reasonable' that Congress meant to create an implicit background rule that actions resulting in an age-disparate impact are as a general matter proscribed." Pet. App. at 17a. Legislation frequently includes clarifying provisions in order to remove argued ambiguities and reassure skeptics; and the insertion of "technically unnecessary" provisions "out of abundance of caution" is "a drafting imprecision venerable enough to have left its mark on legal Latin (*ex abundanti canutela*)." *Fort Stewart Schools v.*

FLRA, 495 U.S. 641, 646 (1990). So, even if the term "reasonable" or, for that matter, the entire RFOA provision were nothing more than confirmation that employer decisions based on reasonable factors other than age are lawful—like Section 4(f)(3)'s confirmation of the lawful employer authority to "discharge or otherwise discipline an individual for good cause"—that would not be a proper basis for reading Section 4(a) to make disparate impact unlawful. *See Lamie v. United States Trustee*, 124 S. Ct. 1023, 1031 (2004) ("Surplusage does not always produce ambiguity and our preference for avoiding surplusage constructions is not absolute."). Indeed, even on this surplusage hypothesis, the RFOA provision would still "underscore the necessity of determining the employer's motives . . . , an essential element in determining whether the employer violated the federal antidiscrimination law," *McKennon*, 513 U.S. at 360; and, as explained above (*supra*, at 13-14), such a focus on employer motives is wholly incompatible with a disparate impact regime.

2. Petitioners' contention (Pet. Br. at 22-24) that the phrase "because of" in Section 4(a)(2) is a mere "causation" requirement is equally off the mark. This contention contradicts petitioners' argument that language must be given the same meaning in each place that it is used in a statute, as the Court in *Hazen Paper* held that the phrase "because of" in Section 4(a)(1) states a discriminatory intent requirement (and not a mere causation or correlation requirement). *See* 507 U.S. at 609, 610, 612. This contention also contradicts petitioners' argument that Section 4(a)(2) should be read to mirror this Court's construction of Section 703(a)(2) of Title VII, as the Court has held that liability is established under that provision only if a neutral practice *both* caused an adverse impact *and* is not demonstrably justified. *See Wards Cove*, 490 U.S. at 658; *Griggs*, 401 U.S. at 430-31. In all events, to use the late-Justice Brennan's words, "[t]o construe the words 'because of' as colloquial shorthand for "but for causation," as [do

petitioners], is to misunderstand them." *Price Waterhouse*, 490 U.S. at 241 (plurality op.) (footnote omitted).

To begin with, in the context of a statute regulating employer conduct with respect to its employees, it makes no sense to construe the phrase "because of" as a mere causation requirement. *All* adverse employer decisions are by definition caused by the employer. If the "because of" phrase is to place any meaningful limits on the statute's application, it must require something more than just causation.

Moreover, there is no basis for—and no authority cited for—petitioners' assertion (Pet. Br. at 22) that "the phrase 'because of' . . . does not refer to an actor's state of mind in all (or even most) contexts . . . ." As shown above (*supra*, at 7-9), the phrase "because of" is naturally and commonly understood as stating a discriminatory motive (as well as a causation) requirement. *See Hazen Paper*, 507 U.S. at 609-10 ("because of" means that a Section 4(a)(1) "disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in [the employer's decisional] process and had a determinative influence on the outcome").

In any event, contrary to petitioners' suggestion (Pet. Br. at 22-23), construing the "because of" language to state a "causation" test does not establish that the ADEA states a disparate impact prohibition. Under Section 4(a)(2), *age* must be the causative factor. Thus, contrary to petitioners' suggestion (Pet. Br. at 23), if an employee is denied a job based on a physical strength test, the worker's employment prospects have *not* been adversely affected because of age, but rather because of physical weakness. That "physical strength is negatively correlated with age" (Pet. Br. at 23) does not itself make the adverse effect of the test on the older worker "because of" age; as the Court analogously held in *Hazen Paper*, even though years of employment service for pension eligibility is "empirically correlated with age," the two factors are "analytically distinct" and "thus it is incorrect to say that a

decision based on years of service is necessarily 'age based'." 507 U.S. at 608, 611. The same is true for a physical strength requirement (and is even more obviously true for a negative correlation between percentage pay increases and age—a correlation plainly having nothing to do with the aging process itself). Indeed, petitioners' effort to *equate* decreased physical strength with old age is precisely the sort of generalized stereotype that the ADEA was designed to prohibit. In a statute premised on the notion that there is a manifest *difference* between aging and negative physical characteristics sometimes associated with aging, age cannot properly be treated as a synonym for characteristics associated with aging.

Petitioners' argument (Pet. Br. at 23) that, had it intended a discriminatory intent requirement, Congress "could have included words such as 'willful,' 'purposeful,' 'knowing,' 'deliberate,' or malice'" proves nothing. This Court has already held that the phrase "because of" age in Section 4(a)(1) states a discriminatory motive requirement. *See Hazen Paper*, 507 U.S. at 609-12. No alternative words were needed in Section 4(a)(1) to establish an intent requirement, and thus none are needed in Section 4(a)(2). Further, both the ADEA and Title VII use words like "willful" and "malice" to establish the higher standard of intent required for imposition of liquidated and/or punitive damages. *See* 29 U.S.C. § 626(b) ("willful[ness]" requirement for liquidated damages); 42 U.S.C. § 1981a(b)(1) ("malice or . . . reckless indifference" requirement for punitive damages). The "because of" language simply establishes the lesser intent standard for a basic disparate treatment claim. *Accord Hazen Paper*, 507 U.S. at 614-17.

Petitioners' final argument (Pet. Br. at 24)—that the phrase "because of" in (both) Sections 4(a)(1) and 4(a)(2) cannot be a reference to a discriminatory intent requirement, since the phrase "based on" in Section 4(f)(1)'s RFOA provision implicates an intent requirement—is weaker yet.

There is no canon of construction which suggests that synonymous phrases in different passages of a statute cannot have similar meanings. On the contrary, the "plain language" canon counsels that statutory words, including synonyms, be given their ordinary and, if appropriate, comparable meanings. *See, e.g., Perrin v. United States*, 444 U.S. 37, 42 (1979). Thus, the phrases "because of" and "based on" may both properly connote an intent requirement, and in the ADEA they surely do.

B. Petitioners' Legislative Policy Arguments Are Also Without Merit

Petitioners' legislative policy arguments are no better. Petitioners point out (Pet. Br. at 25) that, like Title VII, the ADEA is directed at "the elimination of discrimination in the workplace." *McKennon*, 513 U.S. at 358. But, as Justice O'Connor has noted, "[w]hile the prima facie case under *McDonnell Douglas* and the statistical showing of imbalance involved in a disparate impact case may both be indicators of discrimination or its 'functional equivalent,' they are not, in and of themselves, the evils Congress sought to eradicate from the employment setting." *Price Waterhouse*, 490 U.S. at 275 (O'Connor, J., concurring). Rather, the evils that Congress sought to eradicate are the particular forms of discrimination that Congress perceived workers to face; and, as explained above (*supra*, at 15-18), Congress perceived that older workers face more limited forms of discrimination than the ones faced by minorities and women—and, for older workers, that does not include the adverse effects of unjustified neutral practices. Petitioners plainly err in suggesting otherwise.

It is true, as petitioners note (Pet. Br. at 25-26), that the ADEA expresses a concern that "certain otherwise desirable practices may work to the disadvantage of older persons." 29 U.S.C. § 621(a)(2). It is also true, as petitioners note (Pet. Br. at 26-27), that the Secretary's report identifies a number of these practices—including some neutral practices with adverse

effects. But these truths are of no aid to petitioners: "Issues obviously central to disparate impact were never mentioned in committee hearings, in committee reports, or in discussions on the floor of Congress. . . . In addition, no witness or legislator described an employment practice with a disparate impact and said the act would or should outlaw the practice." Gold, 25 Berkeley J. Emp. & Lab. L. at 40, 72 (footnotes omitted). Rather, as explained above (*supra*, at 15-18), the ADEA addresses these practices and the resulting disadvantages for older workers through non-coercive governmental measures such as education, training, and manpower programs; it is no part of the ADEA's purpose to prohibit neutral practices.

Petitioners suggest (Pet. Br. at 27-28) that reading Section 4(a) to provide for disparate impact claims is necessary to assure that the statute addresses the legislative concern with stereotyping of older workers. But, whereas Title VII was concerned with subconscious stereotypes and prejudices rooted in animus, the ADEA was concerned only with generalizations about older persons' work abilities that, while statistically true, may not be applicable to particular older individuals. *See Hazen Paper*, 507 U.S. at 610-11. This distinct concern is fully addressed by providing for disparate treatment claims. As *Hazen Paper* concluded, "[w]hen the employer's decision *is* wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age . . . ." *Id.* at 611 (emphasis in original).

Petitioners further err in suggesting (Pet. Br. at 9, 24, 28-29) that disparate impact claims are necessary to "overcom[e] problems of proof raised by purposeful but veiled discrimination" against older workers. The issue here is not whether statistics are admissible as proof in an age discrimination case—they surely are, and such statistical proof will expose any employer practices that have the effect of systematically disadvantaging older workers. *See Teamsters*

v. United States, 431 U.S. at 339-40. To be sure, such statistics will only be admissible as proof going to whether the employer adopted the practice with a discriminatory motive—*i.e.*, to the question whether the decision was "because of," or "in spite of," age. *Feeney*, 442 U.S. at 279. But the proof of impact will be allowed; and there is nothing unjust or untoward in requiring a determination about the motive for it. In *Watson*, the Court said that it is not "appropriate to hold a defendant liable for unintentional discrimination on the basis of less evidence than is required to prove intentional discrimination." 487 U.S. at 987. Since *Hazen Paper* in turn holds that statistical correlations with age are not sufficient by themselves to establish intentional discrimination under the ADEA, those same insufficient statistical correlations cannot properly establish liability for unintentional discrimination.

Finally, petitioners err in suggesting (Pet. Br. at 27, 29) that disparate impact claims are necessary to protect older workers from thoroughly unjustifiable practices. Petitioners offer no evidence that human resources and labor market pressures are not adequate to deter unreasonable practices with systemic adverse effects on older workers. Nor do petitioners give proper weight to the proposition that "[t]he reasonableness of the employer's reasons may of course be probative of whether they are pretexts. The more idiosyncratic or questionable the employer's reason, the easier it will be to expose it as a pretext, if indeed it is one." *Loeb v. Textron*, 600 F.2d at 1012 n.6. Indeed, petitioners' argument in this regard is actually with the Secretary's conclusion that barring neutral practices with adverse effects on older workers is "futile as public policy, and even contrary to the public interest" (J.A. 78), and that such practices and their effects are better addressed through education, training, and manpower programs. But the 1967 Congress agreed with the Secretary, not with petitioners.

IV. THE COURT SHOULD NOT DEFER TO THE EEOC'S VIEW THAT ADEA DISPARATE IMPACT CLAIMS ARE COGNIZABLE

Throughout their brief, petitioners contend (Pet. Br. at 2-3, 7-9, 11, 13, 24-25, 27-29, 29-36) that, in all events, the Court should defer to the EEOC's view that the ADEA provides for disparate impact claims. But the Solicitor General is not appearing in this case to advocate the adoption of the EEOC's view; and no appellate court has approved ADEA disparate impact claims on the basis of the EEOC's view. Nor should this Court.

First of all, as the court below noted (Pet. App. 10a n.5), the EEOC has not promulgated a regulation—substantive or interpretive—construing the ADEA to provide for disparate impact claims. The interpretive guideline that petitioners cite, 29 C.F.R. § 1625.7(d), is not an interpretation of the prohibitions in Section 4(a). Rather, it is an interpretation of the RFOA provision in Section 4(f)(1) that, as its enacted code heading confirms, defines one "lawful practice[]." And the interpretive guideline does *not* affirmatively construe Section 4(a) to provide for disparate impact claims; instead, it construes Section 4(f)(1) to require a showing of "business necessity" to establish that a practice with "adverse impact" is a "reasonable factor[] other than age." In short, there is no EEOC regulation determining Section 4(a)'s meaning to which the Court could possibly defer. *See John Hancock Mut. Life Ins. Co. v. Harris Trust & Savs. Bank*, 510 U.S. 86, 106-09 & n.17 (1993); *see generally SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) (agency action may be sustained only on grounds relied upon by agency).

To be sure, the EEOC interpretation appears to rest on the assumption that the ADEA provides for disparate impact

claims. But judicial deference is owed, if at all, only to affirmative acts of interstitial lawmaking by an agency; no judicial deference is owed to apparent assumptions made by an agency in the course of addressing a distinct regulatory issue. *See Adamo Wrecking Co. v. United States*, 434 U.S. 275, 287-89 & n.5 (1978) (although "it is undoubtedly a fair inference that the Administrator thought" its regulation was statutorily authorized as an "emission standard," an "implication" was not sufficient and no deference was owed where the Administrator failed to give the issue "specific attention"); *see also SEC v. Sloan*, 436 U.S. 103, 117-18 (1978); *Public Citizen v. HHS*, 332 F.3d 654, 661 (D.C. Cir. 2003).

The EEOC's General Counsel's appellate briefs—arguing that the ADEA does provide for disparate impact claims—do not fill the regulatory vacuum. Agency counsel cannot change what a regulation says or the authority under which a regulation was promulgated. Agency counsel's litigation positions are "hardly tantamount to an administrative interpretation" of the relevant statutory and regulatory provisions. *Investment Co. Inst. v. Camp*, 401 U.S. 617, 628 (1971); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962). On the contrary, as in *Betts* (where the EEOC attempted in this Court to transfer its invalid "cost-justification" interpretation of the term "subterfuge" in Section 4(f)(2) to the statutory phrase "such as a retirement, pension or insurance plan"), this Court should conclude that the EEOC's litigation positions are "entitled to little, if any, deference." *Betts*, 492 U.S. at 174-75.

Second, there is in all events no merit to the EEOC's view that would warrant judicial deference.

a. Contrary to petitioners' suggestion (Pet. Br. at 2, 5, 8, 33-35), the EEOC's view is "at sharp variance with the

original interpretation" of the ADEA by the DOL. Blumrosen, *Interpreting the ADEA: Intent or Impact*, at 102. The DOL's 1968 interpretive bulletin did not address the scope of Section 4(a) and its prohibitions, much less state that Section 4(a) prohibits facially neutral practices with unjustified disparate impact. *See* 29 C.F.R. §§ 860.103-.104 (1970) (App. 46a-50a). On the contrary, the bulletin addressed the RFOA provision and stated, among other things, that: "Whether such differentiations exist must be decided on the basis of all the particular facts and circumstances surrounding each individual situation" (*id.* § 860.103(b)); "[t]he clear purpose [of the provision] is to insure that age . . . is not a determining factor in making any decision regarding . . . employment of an individual" (*id.* § 860.103(c)); "[t]he reasonableness of a differentiation will be determined on an individual, case by case basis, not on the basis of any general or class concept" (*id.* § 860.103(d)); and "situations in which an employee test is used . . . will be carefully scrutinized to ensure that the test is for a permissible purpose and not for purposes prohibited by the statute" (*id.* § 860.104(b)). This is disparate treatment language.

To be sure, the bulletin provided some objective guides that the DOL indicated would support a "differentiation based on reasonable factors other than age." *Id.* § 860.103. But those guides do not implicitly reflect, much less expressly embrace, that the ADEA provides for disparate impact claims. Rather, as might be expected in a bulletin that attempts to "provide 'a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it,'" *id.* § 860.1 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 138 (1944)), these guides explained what an employer had to do to ensure that no enforcement action was initiated by the DOL to challenge an

employer action allegedly based on a reasonable factor other than age. In other words, as this Court held in construing other provisions of the DOL's interpretive bulletin, these guidelines stated "nothing more than a safe harbor, a nonexclusive objective test for employers to use in determining whether they could be certain of qualifying for the . . . exemption." *Betts*, 492 U.S. at 172.

For these reasons, a range of commentators have so read the DOL's bulletin and have stated that the original DOL interpretations did *not* embrace the disparate impact doctrine. *See, e.g.*, Blumrosen, *Interpreting the ADEA: Intent or Impact*, at 96; Player, *Title VII Transplant*, at 1273; Evan H. Pontz, Comment, *What a Difference ADEA Makes: Why Disparate Impact Theory Should Not Apply to the Age Discrimination in Employment Act*, 74 N.C. L. Rev. 267, 316 (1995); Donald R. Stacy, *A Case Against Extending the Adverse Impact Doctrine to ADEA*, 10 Empl. Rel. L. J. 437, 447 (1985). Petitioners' contrary argument is in error.

b. The EEOC's change from the DOL's prior course was precipitous and without thorough consideration. The EEOC's guidelines were proposed only months after the EEOC assumed responsibility for enforcing the ADEA, and long before the EEOC had gained any significant experience with the statute. *See* Proposed Interpretations, 44 Fed. Reg. 68,858, 68,861 (1979) (App. 51a-53a). Moreover, although the EEOC has substantive rulemaking authority under the ADEA, the EEOC chose to issue its guidelines only as "interpretive rules or statements of policy" and without complying with the 30-day notice period required for the imposition of substantive rules (through 29 U.S.C. § 628's express incorporation of the Administrative Procedure Act's rulemaking provisions). *See* Final Interpretations: Age Discrimination in Employment Act, 46 Fed. Reg. 47,724, 47,724 (1981) (App. 54a). Most

importantly, the EEOC issued the pertinent guideline as an interpretation of Section 4(f)(1), not of Section 4(a); did not affirmatively conclude that Section 4(a)(1) provides for disparate impact claims; and, as justification for its construction of Section 4(f)(1), simply cited this Court's decision in *Griggs*, which dealt only with Title VII and says nothing about either Section 4(a) or Section 4(f)(1), and the Sixth Circuit's decision in *Laugesen v. Anaconda Corp.*, 510 F.2d 307 (6th Cir. 1975), which did not even involve a disparate impact claim. *See* 46 Fed. Reg. at 47,725 (App. 55a). Notably, the EEOC did not even mention—much less analyze—then-Justice Rehnquist's earlier issued opinion dissenting from the denial of *certiorari* in *Markham v. Geller*, 451 U.S. 945, which did address these issues.

c. The EEOC's apparent assumption that the ADEA provides for disparate impact claims is bound up in a regulatory interpretation that is itself legally unreasonable. Specifically, the EEOC regulation equates the RFOA provision with a "business necessity" standard and requires compliance with the Uniform Guidelines for Employee Selection. But those guidelines expressly state that they "do not apply to responsibilities under the Age Discrimination in Employment Act." 29 C.F.R. §§ 1607.1(A), 1607.2(D). Moreover, a "business necessity" exists under those guidelines only if, among other things, a challenged practice is "job related" and no equally effective alternative practice with less adverse impact is available. *See id.* §§ 1607.3(B), 1607.6(A). Yet there is no dictionary definition or legal precedent that even arguably allows the term "reasonable" in the RFOA to be given such a restrictive meaning. Indeed, the clause preceding the RFOA provision in Section 4(f)(1) expressly applies to any "bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C.

§ 623(f)(1). As this Court has declared, a standard "of reasonable necessity[] [is] not [one of] reasonableness." *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 419 (1985). In short, the EEOC interpretive regulation on Section 4(f)(1) improperly equated these two distinct standards and is not a legally valid construction of that statutory provision, much less of the meaning of Section 4(a).

d. Most fundamentally, the EEOC interpretation is invalid as contrary to law. Twice before this Court has held that interpretations of the ADEA announced by the EEOC in the 1981 interpretive bulletin went beyond the EEOC's legal authority and thus were not worthy of the Court's deference. *See General Dynamics*, 124 S. Ct. at 1248; *Betts*, 492 U.S. at 171. For the reasons stated throughout this brief, the same is true here.

Finally, petitioners plainly err in suggesting (Pet. Br. at 35-36) that "Congress can fairly be deemed to have acquiesced in the [EEOC's] regulatory construction of the statute." As illustrated by then-Justice Rehnquist's opinion in *Markham*, 451 U.S. at 947-49, the DOJ's briefs opposing recognition of ADEA disparate impact claims, *see, e.g.*, App. 58a-63a, reprinting Brief for Appellant, *Arnold v. Postmaster Gen.*, Nos. 87-5361 & 87-5362, at 16-20 (D.C. Cir. March 10, 1988), and the substantial circuit split that exists on the issue, there has never been an administrative and judicial consensus in which Congress could have acquiesced. *See Fogerty*, 510 U.S. at 532. But, in all events, in order to acquiesce in or ratify any such position, Congress would have at least had to "reenact" or "amend" the pertinent substantive provisions of the ADEA. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978). Congress has not done so, and amendment of other statutory provisions—even related ones—is not legally sufficient. *See, e.g., Betts*, 492 U.S. at 168. Because Congress may legislate

only through bills passed by both Houses and presented to the President, legislative acquiescence may not be found in the mere failure of Congress to disapprove the assumption about disparate impact claims arguably made in the EEOC's 1981 guidelines and later argued in court by the EEOC's lawyers. *See Cent. Bank of Denver, N.A. v. First Interstate Bank*, 511 U.S. 164, 186 (1994); *Landgraf*, 511 U.S. at 264.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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August 2004

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REPORT OF MARY DUNN BAKER, Ph.D.

AZEL P. SMITH, et. al., vs. CITY OF JACKSON, MISSISSIPPI POLICE DEPARTMENT

In The United States District Court
Southern District of Mississippi
Jackson Division

Civil Action No. 3:01CV367BN

Economic Research Services
Tallahassee, Florida
April 5, 2002

I. INTRODUCTION

At the request of Counsel for the City of Jackson, Mississippi, Economic Research Services (ERS) was asked to review and critique Dr. Marcelo Eduardo's March 11, 2002 Expert Report. In addition, I was asked to prepare analyses to determine whether the data provide support for Plaintiffs' claim that Jackson Police Department (JPD) sworn officers in the protected age group (age 40 and older) were adversely impacted by the transition to the revised pay plan implemented in March 1999.

I am a labor economist with extensive experience in statistical analyses of employment practices and in the computation of economic loss estimates. I completed the Ph.D. in Economics at Florida State University in 1986. Since July, 1986 I have been employed by ERS in Tallahassee, Florida. ERS is a research and consulting firm whose professionals work with individuals, government agencies, colleges and universities, corporations and other organizations to analyze employment decision-making processes and to compute estimates of the value of alleged economic losses. I have testified in federal courts and other judicial settings about statistical analyses and economic loss estimates that I have prepared on behalf of both plaintiffs and defendants. For the

last several years, I, along with other ERS Ph.D. economists, have presented seminars on the economics and statistics of employment discrimination and the computation of the value of losses resulting from a variety of events and actions (e.g., wrongful termination). I have been invited by organizations such as the Florida Bar Association and the American Association of Affirmative Action to give lectures and conduct workshops on statistical analyses of employment issues and the valuation of economic losses. An outline of my credentials and the cases in which I have given testimony is provided at Exhibit 1.

II. DATA AND DOCUMENTS

In addition to Dr. Eduardo's March 11, 2002 report, I relied upon the following data and documents to prepare this report.

- Plaintiffs' Complaint;
- City of Jackson Performance Pay Plan, October 1, 1998;
- City of Jackson Pay Plan Revision, Sworn Police, January 19, 1999;
- Jackson Police Department Salaries as of 1-2-1999 which provides the name, rank, hire date, adjusted hire date and base salary for the Department's sworn officers;
- A document titled Implementation Dates, Police Department, 03/01/99 which provides the name, rank, step and pay rate as of that date;
- Payroll Information, Sworn Police and Dispatchers For 1999 that includes the name, rank, and date of birth, among other items for each officer; and
- Payroll information for sworn officers as of July 1, 1998 that includes the name, rank, and monthly pay rate, among other items for each officer.

III. ANALYSIS

Dr. Eduardo conducted two tests (80% Rule test and Z test) to determine whether the officers in the protected and unprotected age groups were similarly likely to receive double-digit (10% or larger) pay increases in March 1999. His analyses show that older officers were less likely than younger officers to receive double-digit pay increases. Based on the results of these analyses, he concluded that the transition to the new pay plan adversely impacted older officers. As discussed below, it is my opinion that Dr. Eduardo's results are misleading because his analyses assume that the ratio of ½/1999 pay and market pay was similar for older and younger officers. As demonstrated below, this is not the case.

Further, Dr. Eduardo analyzed the percentage increase in pay rates as of March 1, 1999, when the actual transition to the revised pay plan began in October 1998. Since the transition to the March 1, 1999 pay rates was a two-stage process, he should have analyzed the percentage increase in pay rates from the beginning of the transition through the March 1, 1999 increase in pay rates.[1]

According to the Performance Pay Plan, the purpose of implementing the new pay plan was, among other goals, to "attract and retain qualified people" and "maintain competitiveness with other public sector agencies." Exhibit 2 shows the March 1, 1999 semi-monthly pay rates for JPD sworn officers at each rank and step. It is my understanding that these rates were consistent with external market rates of pay.[2]

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[1] It is my understanding that the July 1, 1998 salaries were in effect at the beginning of the transition to the new pay plan.

[2] I have not conducted any studies to determine how the new pay plan rates compare to external market salaries.

According to the data provided, as of March 1, 1999, all officers assigned to a given rank/step were paid the market salary for that rank/step. Exhibit 3 provides a comparison of the average 7/1/1998 salary and the 3/1/1999 market rate for each rank and step.[3] As Exhibit 3 shows, on average, generally the difference between the 7/1/1998 and the market rates was smaller for the higher ranks than the lower ranks. This indicates that, prior to the implementation of the new pay plan, officers in the higher ranks were less underpaid, relative to the market, than officers in the lower ranks. Consequently, to reach the market level, the requisite pay increase was smaller for higher ranks than lower ranks.

Exhibit 3 provides the average age of officers and the percent of officers who were at least age 40 at each rank/step. As Exhibit 3 illustrates, on average, officers in the higher ranks are older than those in lower ranks. Since higher rank officers are older, on average, than lower rank officers and higher rank officers were less underpaid (relative to the market) than lower rank officers, older officers received smaller percentage changes in pay than their younger counterparts. Hence, the data indicate that older officers received smaller raises than their younger counterparts, not because of their age, but because their 7/1/1998 salaries were closer to market rates than were the salaries of their younger counterparts. As Exhibit 4 shows, younger and older officers with the same rank/step and 7/1/1998 pay rate received the same pay increases on 3/1/1999.

/s/ Mary Dunn Baker — April 5, 2002

Name — Date

[3] Exhibit 3 excludes officers who had a change in job between 7/1/1998 and 3/1/1999 because they received other salary adjustments, as well as market adjustments. There is little difference in the figures shown on Exhibit 3 when officers who had a change in job are included.

Exhibit 2

March 1, 1999 Pay Rates by Rank/Step

Jackson Police Department
Sworn Officers

Rank	Step	Semi-Monthly Pay Rate March 1999	Total Number of Officers	Number Under Age 40	Number of Non-Plaintiffs Age 40 and Older	Number of Plaintiffs
Police Officer	Step 1	$1,103.63	103	95	8	0
	Step 1.5	$1,131.21	93	87	6	0
Master Police Officer	Step 1.5	$1,357.46	69	12	37	20
	Step 2.5	$1,426.17	2	0	1	1
	Step 3	$1,461.83	3	0	1	2
	Step 3.5	$1,498.38	1	0	0	1
	Step 4	$1,535.83	3	0	3	0
Police Sergeant	Step 1.5	$1,628.96	2	0	2	0
	Step 2	$1,669.67	32	5	26	1
	Step 2.5	$1,711.42	1	0	1	0
Police Lieutenant	Step 2	$1,878.42	3	0	2	1
	Step 3	$1,973.50	1	0	1	0
Deputy Police Chief	Step 1.5	$2,217.42	1	0	1	0

Source: Data provided by Jackson Police Department.

Note: These data do not include employees who changed jobs between 7/1/98 and 3/1/99. Plaintiff Haymer is not included in the number of plaintiffs because he was promoted from Police Officer to Master Police Officer.

Exhibit 3

Average Pay Rates and Age by Rank/Step

Jackson Police Department
Sworn Officers

Rank	Step	Number of Employees	7/1/98 Average Pay Rate	3/1/99 Average Pay Rate	Dollar Difference Between 7/1/98 and 3/1/99 Average Pay Rates	Percentage Difference Between 7/1/98 and 3/1/99 Average Pay Rates	Average Age	Percent Age 40 and Older
Police Officer	Step 1	103	$893.01	$1,103.63	$210.62	23.59%	32.0	7.77%
	Step 1.5	93	$930.72	$1,131.21	$200.49	21.54%	33.7	6.45%
Master Police Officer	Step 1.5	69	$1,091.24	$1,357.46	$266.22	24.40%	44.1	82.61%
	Step 2.5	2	$1,260.00	$1,426.17	$166.17	13.19%	46.4	100.00%
	Step 3	3	$1,294.62	$1,461.83	$167.21	12.92%	52.2	100.00%
	Step 3.5	1	$1,306.15	$1,498.38	$192.23	14.72%	48.7	100.00%
	Step 4	3	$1,365.38	$1,535.83	$170.45	12.48%	54.1	100.00%
Police Sergeant	Step 1.5	2	$1,466.77	$1,628.96	$162.19	11.06%	44.0	100.00%
	Step 2	32	$1,506.92	$1,669.67	$162.75	10.80%	45.2	84.38%
	Step 2.5	1	$1,511.08	$1,711.42	$200.34	13.26%	53.9	100.00%
Police Lieutenant	Step 2	3	$1,668.00	$1,878.42	$210.42	12.62%	55.9	100.00%
	Step 3	1	$1,758.46	$1,973.50	$215.04	12.23%	49.0	100.00%
Deputy Police Chief	Step 1.5	1	$1,962.00	$2,217.42	$255.42	13.02%	50.6	100.00%

Source: Data provided by Jackson Police Department.

Note: These data do not include employees who changed jobs between 7/1/98 and 3/1/99.

REPORT OF JAMES E. PEARCE, Ph.D.

AZEL P. SMITH, et al., vs. CITY OF JACKSON, MISSISSIPPI POLICE DEPARTMENT

In the United States District Court
Southern District of Mississippi
Jackson Division

Civil Action No. 3:01CV367BN

Welch Consulting
College Station, TX
April 5, 2002

Qualifications.

I am a Senior Economist at Welch Consulting, a firm specializing in economic and statistical research. I received training in economics and statistics at the University of California at Los Angeles, where I earned a Ph.D. in economics in 1980. Prior to joining Welch Consulting I was Vice President and Director of Research at the Federal Home Loan Bank of Atlanta. I have also served as Vice President and Associate Director of Research at the Federal Reserve Bank of Dallas, and I have taught economics and finance at Southern Methodist University and the Georgia Institute of Technology. I have also served as a consultant for the Department of Housing and Urban Development and for Freddie Mac. My resume is attached as Exhibit 1 and a list of my prior testimony is attached as Exhibit 2. My hourly rate is $275.

Assignment

Beginning in October 1998 the city of Jackson, Mississippi implemented a new compensation and appraisal system for city employees, including police officers. In the transition from the former system to the new one, all police officers received a one-time pay increase of 2.0% or more. Plaintiffs' claim that the implementation had a disparate impact on older

officers in that increases granted to officers age 40 and older were, on average, smaller than the increases granted to officers under age 40. Counsel for the City of Jackson has asked that I evaluate the business justification underlying the implementation of the new pay plan.

In the course of my review I have relied on the following documents:

- The Plaintiffs' complaint;
- City of Jackson, Performance Pay Plan (October 1, 1998);
- City of Jackson, Police/Fire Pay Plan Revision (March 1, 1999);
- All City of Jackson Full Time Employees, Joyce Scott (July 8, 1998) (Printed copy of spreadsheet with Employee Number, Name, Range, Title, Current Salary, and other information on Jackson employees);
- City of Jackson Performance Pay Plan, Semi-Monthly Rates-Police Ranks, March 1,1999;
- City of Jackson, Salary Survey Results, Southeastern Region (June 26, 1998);
- *Dramatically Reducing Crime in Jackson, Mississippi: A Plan of Action for the Jackson Police Department* (May 27, 1999);
- Electronic copy of spreadsheet from Mary Baker containing hire date and semi-monthly pay rates for police officers as of ½/99 and 3/1/99;
- Discussions with Ms. Marilyn Hetrick, former Deputy Personnel Management Director for the City of Jackson.

Background

In the late 1990s the city of Jackson, Mississippi developed programs to address two issues of concern to the citizens and leadership of the community. One issue was a relatively high

crime rate and an understaffed police force. Another was a pay system for city employees that was viewed as a handicap in attracting, retaining, and motivating city employees, including police officers and fire fighters. The system did not include formal performance appraisals, scheduled pay increases, or a linkage of pay increases to measured performance.

The city reformed its system for setting pay rates for its civilian, police, and fire employees in 1998 and 1999. The new system included regular performance appraisals, pay ranges with nine pay rates (or "steps"), and regularly scheduled pay increases tied to performance ratings. The city also adopted a program to reform its police department, as described in *Dramatically Reducing Crime in Jackson, Mississippi: A Plan of Action for the Jackson Police Department,* produced by the Linder/Maple Group of New York. The reform of the pay system for police was an important component of the program to make the police department more effective.

Pay Increases at Implementation of the New Compensation Program

Table 1 shows the age distribution of officers in the major police ranks just prior to the beginning of the implementation of the new pay system. The largest number of officers was in the lowest rank, Police Officer. Over 90% of the officers in this rank are under age 40. The next rank, Master Police Officer, includes a mixture of younger and older officers, with about 25% under age 40. In ranks above Master Police Officer, a high percentage of officers are 40 and over.

Table 1

Age Distribution of Police Ranks, July 1998

Rank	Officers	Age <40	Age 40+
Police Officer	207	91.7%	8.3%
Master Police Officer	87	19.5%	80.5%
Police Sergeant	42	17.1%	83.3%
Police Lieutenant	7	0.0%	100.0%

The implementation of the new system involved two steps: (1) Setting the new ranges and (2) positioning the pay rates of incumbent officers in the new ranges. The minimums of the new ranges were set on the basis of a survey of comparable communities in the Southeast. Locating officers' pay rates within the new ranges was determined by a simple rule: each officer's pay rate was set at the bottom of the range (Step 1) or the next highest point (Step 1.5), depending on the officer's seniority. If the resulting pay rate was not at least 2% above the pre-implementation pay rate, the officer's pay rate was moved to the lowest point in the range that would provide a 2% pay increase.

The minimums of the old and new ranges are shown in Table 2. The table indicates that the bottom of the range for the Police Officer rank, which has the highest percentage of younger officers, was shifted upward by 20%, while the other ranges were shifted up by larger amounts. Thus, the range containing the most of the officers under age 40 was shifted upward by a smaller amount than the ranges in which 75% or more of the officers were 40 or older.

Table 2

Range Minimums Under Former and Revised Systems

(Semi-Monthly Rates)

Rank	Former	Revised	Increase
Police Officer	$924	$1,104	19.5%
Master Police Officer	$1,020	$1,324	29.8%
Police Sergeant	$1,228	$1,589	29.4%
Police Lieutenant	$1,424	$1,788	25.6%

The relationships between pre-implementation pay rates and the minimums of the new ranges are shown in Table 3. The average pre-reform pay rate for the Police Officer rank was 10% below the new minimum, while the averages for the Sergeant and Lieutenant ranks were slightly above the new minimum. For these ranks the average pay rates were unrelated to age or seniority. The average pre-reform pay rate for the Master Policeman rank increased with age, but for each age group the average was below the new minimum (Table 4). The implication of Tables 3 and 4 is that pre-reform pay rates for officers under age 40 were much more likely to below the minimums of the new ranges by 10% or more than were the pre-reform pay rates for officers 40 and older.

Table 3 Pre-Reform Average Pay Rates and Minimums of New Pay Ranges			
Rank	**New Minimum**	**Pre-Reform Average Pay**	**Average Relative to New Minimum**
Police Officer	1,104	991	-10.2%
Master Police Officer	1,324	1207	-8.8%
Police Sergeant	1,589	1640	3.2%
Police Lieutenant	1,788	1828	2.2%

Table 4 Master Police Officer Pre-Reform Pay Rates			
	Age Group		
	<40	**40-44**	**45+**
Average Pre-Reform Pay Rate	$1,105	$1,175	$1,286
Average Relative to New Minimum	-16.5%	-11.4%	-2.9%
Number of Master Police Officers	17	34	36

Under the procedure for setting initial pay rates under the new system, the fact that pre-implementation pay rates for officers under age 40 were more likely to be below the minimum of the relevant range by 10% would likely result in larger average increases for officers under age 40.

Implementation Alternatives

The prospect that average pay increases at implementation would differ by age could have been moderated by changing some of the parameters of the new system. However, any

changes that would have had that effect would have sacrificed important objectives of the reform or increased city payroll expense. One possible approach would have been to shift all the salary ranges up by smaller amounts than those shown in Table 2. This would have reduced the increases for most officers under age 40 without impacting the increases for most officers 40 and older. However, this alternative would have compromised the city's efforts to increase the size and quality of the police force, an unattractive alternative given the city's high crime rate and low ratio of officers to population.

Another possibility would have been to move the salaries of senior officers to higher points in the new salary ranges. This alternative would have required additional money, and it would have undercut the plan to make advancement through the new ranges contingent on continued satisfactory performance. Furthermore, the city's procedure in this matter was somewhat more generous to older, more senior employees than the procedure typically followed by other employers in similar circumstances. I have ten years' experience in analyzing pay histories of workforces involved in litigation, and these histories frequently include adjustments to salary ranges–sometimes for individual jobs and sometimes for many positions at once. In my experience employers generally limit pay adjustments associated with increases in salary ranges to bringing below-range salaries up to the new minimum.[1]

[1] Plaintiffs' complaint implies that Jackson had made a practice of relating pay increases to seniority. However, Ms. Hetrick indicated that this was not the case, and my review of the data shows no relationship between pay prior to implementation and seniority for any rank other than Master Policeman. Thus, there does not seem to be any basis for the officers to expect that those with more seniority would receive larger increases at implementation.

Conclusion

In my opinion, the city of Jackson, Mississippi could not have eliminated the likely age difference in pay increases granted on implementation of the new compensation system in 1998 and 1999 without compromising key city objectives or substantially increasing city expenditures. This opinion is based on the information available to me at this time and the review I have conducted to date. I may need to supplement this report if I receive additional information or have the opportunity to conduct a further review of the material I have.

/s/

James E. Pearce, Ph.D.

April 5, 2002

UNITED STATES CODE ANNOTATED

TITLE 29. LABOR

CHAPTER 14--AGE DISCRIMINATION IN EMPLOYMENT

§ 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that--

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

§ 622. Education and research program; recommendation to Congress

(a) The Secretary of Labor shall undertake studies and provide information to labor unions, management, and the general public concerning the needs and abilities of older workers, and their potentials for continued employment and contribution to the economy. In order to achieve the purposes of this chapter, the Secretary of Labor shall carry on a continuing program of education and information, under which he may, among other measures--

(1) undertake research, and promote research, with a view to reducing barriers to the employment of older persons, and the promotion of measures for utilizing their skills;

(2) publish and otherwise make available to employers, professional societies, the various media of communication, and other interested persons the findings of studies and other materials for the promotion of employment;

(3) foster through the public employment service system and through cooperative effort the development of facilities of public and private agencies for expanding the opportunities and potentials of older persons;

(4) sponsor and assist State and community informational and educational programs.

(b) Not later than six months after the effective date of this chapter, the Secretary shall recommend to the Congress any measures he may deem desirable to change the lower or upper age limits set forth in section 631 of this title.

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer--

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) Employment agency practices

It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices

It shall be unlawful for a labor organization--

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise

adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc.

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization--

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section--

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan--

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter; or

(3) to discharge or otherwise discipline an individual for good cause.

(g) Repealed. Pub. L. 101-239, Title VI, § 6202(b)(3)(C)(i), Dec. 19, 1989, 103 Stat. 2233

(h) Practices of foreign corporations controlled by American employers; foreign employers not controlled by American employers; factors determining control

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the--

(A) interrelation of operations,

(B) common management,

(C) centralized control of labor relations, and

(D) common ownership or financial control, of the employer and the corporation.

(i) Employee pension benefit plans; cessation or reduction of benefit accrual or of allocation to employee account; distribution of benefits after attainment of normal retirement age; compliance; highly compensated employees

(1) Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof to establish or maintain an employee pension benefit plan which requires or permits--

(A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, or

(B) in the case of a defined contribution plan, the cessation of allocations to an employee's account, or the reduction of the rate at which amounts are allocated to an employee's account, because of age.

(2) Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

(3) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan--

(A) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and

(B) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year in accordance with section 1056(a)(3) of this title and section 401(a)(14)(C) of Title 26, and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 1053(a)(3)(B) of this title or section 411(a)(3)(B) of Title 26, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution of benefits after the attainment of normal retirement age.

The provisions of this paragraph shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations shall provide for the application of the preceding provisions of this paragraph to all employee pension benefit plans subject to this subsection and may provide for the application of such provisions, in the case of any such employee, with respect to any period of time within a plan year.

(4) Compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan.

(5) Paragraph (1) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414(q) of Title 26) to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination in favor of highly compensated employees within the meaning of subchapter D of chapter 1 of Title 26.

(6) A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals or it is a plan permitted by subsection (m) of this section.

(7) Any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 411(b)(1)(H) of Title 26 and subparagraphs (C) and (D) of section 411(b)(2) of Title 26 shall apply with respect to the requirements of this subsection in the same manner and to the same extent as such regulations apply with respect to the requirements of such sections 411(b)(1)(H) and 411(b)(2).

(8) A plan shall not be treated as failing to meet the requirements of this section solely because such plan provides a normal retirement age described in section 1002(24)(B) of this title and section 411(a)(8)(B) of Title 26.

(9) For purposes of this subsection--

(A) The terms "employee pension benefit plan", "defined benefit plan", "defined contribution plan", and "normal retirement age" have the meanings provided such terms in section 1002 of this title.

(B) The term "compensation" has the meaning provided by section 414(s) of Title 26.

(j) Employment as firefighter or law enforcement officer

It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken--

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer, the employer has complied with section 3(d)(2) of the Age Discrimination in Employment Amendments of 1996 if the individual was discharged after the date described in such section, and the individual has attained--

(A) the age of hiring or retirement, respectively, in effect under applicable State or local law on March 3, 1983; or

(B)(i) if the individual was not hired, the age of hiring in effect on the date of such failure or refusal to hire under applicable State or local law enacted after September 30, 1996; or

(ii) if applicable State or local law was enacted after September 30, 1996, and the individual was discharged, the higher of--

(I) the age of retirement in effect on the date of such discharge under such law; and

(II) age 55; and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

(k) Seniority system or employee benefit plan; compliance

A seniority system or employee benefit plan shall comply with this chapter regardless of the date of adoption of such system or plan.

(l) Lawful practices; minimum age as condition of eligibility for retirement benefits; deductions from severance pay; reduction of long-term disability benefits

Notwithstanding clause (i) or (ii) of subsection (f)(2)(B) of this section--

(1) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because--

(A) an employee pension benefit plan (as defined in section 1002(2) of this title) provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits; or

(B) a defined benefit plan (as defined in section 1002(35) of this title) provides for--

(i) payments that constitute the subsidized portion of an early retirement benefit; or

(ii) social security supplements for plan participants that commence before the age and terminate at the age (specified by the plan) when participants are eligible to receive reduced or unreduced old-age insurance benefits under title II of the Social Security Act (42 U.S.C. 401 et seq.), and that do not exceed such old-age insurance benefits.

(2)(A) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because following a contingent event unrelated to age--

(i) the value of any retiree health benefits received by an individual eligible for an immediate pension;

(ii) the value of any additional pension benefits that are made available solely as a result of the contingent event unrelated to age and following which the individual is eligible for not less than an immediate and unreduced pension; or

(iii) the values described in both clauses (i) and (ii); are deducted from severance pay made available as a result of the contingent event unrelated to age.

(B) For an individual who receives immediate pension benefits that are actuarially reduced under subparagraph (A)(i), the amount of the deduction available pursuant to subparagraph (A)(i) shall be reduced by the same percentage as the reduction in the pension benefits.

(C) For purposes of this paragraph, severance pay shall include that portion of supplemental unemployment compensation benefits (as described in section 501(c)(17) of Title 26) that--

(i) constitutes additional benefits of up to 52 weeks;

(ii) has the primary purpose and effect of continuing benefits until an individual becomes eligible for an immediate and unreduced pension; and

(iii) is discontinued once the individual becomes eligible for an immediate and unreduced pension.

(D) For purposes of this paragraph and solely in order to make the deduction authorized under this

paragraph, the term "retiree health benefits" means benefits provided pursuant to a group health plan covering retirees, for which (determined as of the contingent event unrelated to age)--

(i) the package of benefits provided by the employer for the retirees who are below age 65 is at least comparable to benefits provided under title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.);

(ii) the package of benefits provided by the employer for the retirees who are age 65 and above is at least comparable to that offered under a plan that provides a benefit package with one-fourth the value of benefits provided under title XVIII of such Act; or

(iii) the package of benefits provided by the employer is as described in clauses (i) and (ii).

(E) (i) If the obligation of the employer to provide retiree health benefits is of limited duration, the value for each individual shall be calculated at a rate of $3,000 per year for benefit years before age 65, and $750 per year for benefit years beginning at age 65 and above.

(ii) If the obligation of the employer to provide retiree health benefits is of unlimited duration, the value for each individual shall be calculated at a rate of $48,000 for individuals below age 65, and $24,000 for individuals age 65 and above.

(iii) The values described in clauses (i) and (ii) shall be calculated based on the age of the individual as of the date of the contingent event unrelated to age. The values are effective on October 16, 1990, and shall be adjusted on an annual basis, with respect to a contingent event

that occurs subsequent to the first year after October 16, 1990, based on the medical component of the Consumer Price Index for all-urban consumers published by the Department of Labor.

(iv)If an individual is required to pay a premium for retiree health benefits, the value calculated pursuant to this subparagraph shall be reduced by whatever percentage of the overall premium the individual is required to pay.

(F) If an employer that has implemented a deduction pursuant to subparagraph (A) fails to fulfill the obligation described in subparagraph (E), any aggrieved individual may bring an action for specific performance of the obligation described in subparagraph (E). The relief shall be in addition to any other remedies provided under Federal or State law.

(3) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because an employer provides a bona fide employee benefit plan or plans under which long-term disability benefits received by an individual are reduced by any pension benefits (other than those attributable to employee contributions)--

(A)paid to the individual that the individual voluntarily elects to receive; or

(B) for which an individual who has attained the later of age 62 or normal retirement age is eligible.

(m) Voluntary retirement incentive plans

Notwithstanding subsection (f)(2)(b), it shall not be a violation of subsection (a), (b), (c), or (e) solely because a plan of an institution of higher education (as defined in section 1001 of Title 20) offers employees who are serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) supplemental benefits upon voluntary

retirement that are reduced or eliminated on the basis of age, if--

(1) such institution does not implement with respect to such employees any age-based reduction or cessation of benefits that are not such supplemental benefits, except as permitted by other provisions of this chapter;

(2) such supplemental benefits are in addition to any retirement or severance benefits which have been offered generally to employees serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure), independent of any early retirement or exit-incentive plan, within the preceding 365 days; and

(3) any employee who attains the minimum age and satisfies all non-age-based conditions for receiving a benefit under the plan has an opportunity lasting not less than 180 days to elect to retire and to receive the maximum benefit that could then be elected by a younger but otherwise similarly situated employee, and the plan does not require retirement to occur sooner than 180 days after such election.

§ 624. Study by Secretary of Labor; reports to President and Congress; scope of study; implementation of study; transmittal date of reports

(a)(1) The Secretary of Labor is directed to undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement, and report his findings and any appropriate legislative recommendations to the President and to the Congress. Such study shall include--

(A) an examination of the effect of the amendment made by section 3(a) of the Age Discrimination in Employment Act Amendments of 1978 in raising the upper age limitation established by section 631(a) of this title to 70 years of age;

(B) a determination of the feasibility of eliminating such limitation;

(C) a determination of the feasibility of raising such limitation above 70 years of age; and

(D) an examination of the effect of the exemption contained in section 631(c) of this title, relating to certain executive employees, and the exemption contained in section 631(d) of this title, relating to tenured teaching personnel.

(2) The Secretary may undertake the study required by paragraph (1) of this subsection directly or by contract or other arrangement.

(b) The report required by subsection (a) of this section shall be transmitted to the President and to the Congress as an interim report not later than January 1, 1981, and in final form not later than January 1, 1982.

§ 625. Administration

The Secretary shall have the power--

(a) Delegation of functions; appointment of personnel; technical assistance

to make delegations, to appoint such agents and employees, and to pay for technical assistance on a fee for service basis, as he deems necessary to assist him in the performance of his functions under this chapter;

(b) Cooperation with other agencies, employers, labor organizations, and employment agencies

to cooperate with regional, State, local, and other agencies, and to cooperate with and furnish technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of this chapter.

§ 626. Recordkeeping, investigation, and enforcement

(a) Attendance of witnesses; investigations, inspections, records, and homework regulations

The Equal Employment Opportunity Commission shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title.

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and

to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed--

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective

defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(e) Reliance on administrative rulings; notice of dismissal or termination; civil action after receipt of notice

Section 259 of this title shall apply to actions under this chapter. If a charge filed with the Commission under this chapter is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 630(a) of this title against the respondent named in the charge within 90 days after the date of the receipt of such notice.

(f) Waiver

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum--

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to--

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633a of this title may not

be considered knowing and voluntary unless at a minimum--

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

§ 627. Notices to be posted

Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Equal Employment Opportunity Commission setting forth information as the Commission deems appropriate to effectuate the purposes of this chapter.

§ 628. Rules and regulations; exemptions

In accordance with the provisions of subchapter II of chapter 5 of Title 5, the Equal Employment Opportunity Commission may issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter, and may establish such reasonable exemptions to and from any

or all provisions of this chapter as it may find necessary and proper in the public interest.

§ 629. Criminal penalties

Whoever shall forcibly resist, oppose, impede, intimidate or interfere with a duly authorized representative of the Equal Employment Opportunity Commission while it is engaged in the performance of duties under this chapter shall be punished by a fine of not more than $500 or by imprisonment for not more than one year, or by both: *Provided, however*, That no person shall be imprisoned under this section except when there has been a prior conviction hereunder.

§ 630. Definitions

For the purposes of this chapter--

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided*, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is fifty or more prior to July 1, 1968, or twenty-five or more on or after July 1, 1968, and such labor organization--

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended [29 U.S.C.A. § 151 et seq.], or the Railway Labor Act, as amended [45 U.S.C.A. § 151 et seq.]; or

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking

to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C.A. § 401 et seq.].

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C.A. § 1331 et seq.].

(j) The term "firefighter" means an employee, the duties of whose position are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

(k) The term "law enforcement officer" means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of a State, including an employee engaged in this activity who is transferred to a supervisory or administrative position. For the purpose of this subsection, "detention" includes the duties of employees assigned to guard individuals incarcerated in any penal institution.

(l) The term "compensation, terms, conditions, or privileges of employment" encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan.

§ 631. Age limits

(a) Individuals at least 40 years of age

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.

(b) Employees or applicants for employment in Federal Government

In the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 633a of this title, the prohibitions established in section 633a of this title shall be limited to individuals who are at least 40 years of age.

(c) Bona fide executives or high policymakers

(1) Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age and who, for the 2- year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least $44,000.

(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with regulations prescribed by the Equal Employment Opportunity Commission, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not

contribute and under which no rollover contributions are made.

§ 632. Omitted

§ 633. Federal-State relationship

(a) Federal action superseding State action

Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action.

(b) Limitation of Federal action upon commencement of State proceedings

In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: Provided, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

§ 633a. Nondiscrimination on account of age in Federal Government employment

(a) Federal agencies affected

All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the General Accounting Office, and the Library of Congress shall be made free from any discrimination based on age.

(b) Enforcement by Equal Employment Opportunity Commission and by Librarian of Congress in the Library of Congress; remedies; rules, regulations, orders, and instructions of Commission: compliance by Federal agencies; powers and duties of Commission; notification of final action on complaint of discrimination; exemptions: bona fide occupational qualification

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission is authorized to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Equal Employment Opportunity Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out

its responsibilities under this section. The Equal Employment Opportunity Commission shall--

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a) of this section;

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Equal Employment Opportunity Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil actions; jurisdiction; relief

Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal

or equitable relief as will effectuate the purposes of this chapter.

(d) Notice to Commission; time of notice; Commission notification of prospective defendants; Commission elimination of unlawful practices

When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

(e) Duty of Government agency or official

Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

(f) Applicability of statutory provisions to personnel action of Federal departments, etc.

Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provisions of section 631(b) of this title and the provisions of this section.

(g) Study and report to President and Congress by Equal Employment Opportunity Commission; scope

(1) The Equal Employment Opportunity Commission shall undertake a study relating to the effects of the amendments made to this section by the Age

Discrimination in Employment Act Amendments of 1978, and the effects of section 631(b) of this title.

(2) The Equal Employment Opportunity Commission shall transmit a report to the President and to the Congress containing the findings of the Commission resulting from the study of the Commission under paragraph (1) of this subsection. Such report shall be transmitted no later than January 1, 1980.

§ 634. Authorization of appropriations

There are hereby authorized to be appropriated such sums as may be necessary to carry out this chapter.

* * *

29 C.F.R. § 860 (1970):

§ 860.1 Purpose of this Part.

This part is intended to provide an interpretative bulletin on the Age Discrimination in Employment Act of 1967 like Subchapter B of this title relating to the Fair Labor Standards Act of 1938. Such interpretations of this Act are published to provide "a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it" (Skidmore v. Swift & Co., 323 U.S. 134, 138). These interpretations indicate the construction of the law which the Department of Labor believes to be correct, and which will guide it in the performance of its administrative and enforcement duties under the Act unless and until it is otherwise directed by authoritative decisions of the Courts or concludes, upon reexamination of an interpretation, that it is incorrect.

[33 F.R. 9172, June 21, 1968]

* * *

§ 860.103 Differentiations based on reasonable factors other than age.

(a) Section 4(f)(1) of the Act provides that "It shall not be unlawful for an employer, employment agency, or labor organization * * * to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section * * * where the differentiation is based on reasonable factors other than age; * * *"

(b) No precise and unequivocal determination can be made as to the scope of the phrase "differentiation based on reasonable factors other than age." Whether such differentiations exist must be decided on the basis of all the particular facts and circumstances surrounding each individual situation.

(c) It should be kept in mind that it was not the purpose or intent of Congress in enacting this Act to require the employment of anyone, regardless of age, who is disqualified on grounds other than age from performing a particular job. The clear purpose is to insure that age, within the limits prescribed by the Act, is not a determining factor in making any decision regarding hiring, dismissal, promotion or any other term, condition or privilege of employment of an individual.

(d) The reasonableness of a differentiation will be determined on an individual, case by case basis, not on the basis of any general or class concept, with unusual working conditions given weight according to their individual merit.

(e) Further, in accord with a long chain of decisions of the Supreme Court of the United States with respect to other remedial labor legislation, all exceptions such as this must be construed narrowly, and the burden of proof in establishing the applicability of the exception will rest upon the employer, employment agent or labor union which seeks to invoke it.

(f) Where the particular facts and circumstances in individual situations warrant such a conclusion, the following factors are among those which may be recognized as supporting a differentiation based on reasonable factors other than age:

(1) (i) Physical fitness requirements based upon preemployment or periodic physical examinations relating to minimum standards for employment: *Provided, however,* That such standards are reasonably necessary for the specific work to be performed and are uniformly and equally applied to all applicants for the particular job category, regardless of age.

(ii) Thus, a differentiation based on a physical examination, but not one based on age, may be recognized as reasonable in certain job situations which necessitate stringent physical requirements due to inherent occupational factors

such as the safety of the individual employees or of other persons in their charge, or those occupations which by nature are particularly hazardous: For example, iron workers, bridge builders, sandhogs, underwater demolition men, and other similar job classifications which require rapid reflexes or a high degree of speed, coordination, dexterity, endurance, or strength.

(iii) However, a claim for a differentiation will not be permitted on the basis of an employer's assumption that every employee over a certain age in a particular type of job usually becomes physically unable to perform the duties of that job. There is medical evidence, for example, to support the contention that such is generally not the case. In many instances, an individual at age 60 may be physically capable of performing heavy-lifting on a job, whereas another individual of age 30 may be physically incapable of doing so.

(2) Evaluation factors such as quantity or quality of production, or educational level, would be acceptable bases for differentiation when, in the individual case, such factors are shown to have a valid relationship to job requirements and where the criteria or personnel policy establishing such factors are applied uniformly to all employees, regardless of age.

(g) The foregoing are intended only as examples of differentiations based on reasonable factors other than age, and do not constitute a complete or exhaustive list or limitation. It should always be kept in mind that even in situations where experience has shown that most elderly persons do not have certain qualifications which are essential to those who hold certain jobs, some may have them even though they have attained the age of 60 or 64, and thus discrimination based on age is forbidden.

(h) It should also be made clear that a general assertion that the average cost of employing older workers as a group is higher than the average cost of employing younger workers as

a group will not be recognized as a differentiation under the terms and provisions of the Act, unless one of the other statutory exceptions applies. To classify or group employees solely on the basis of age for the purpose of comparing costs, or for any other purpose, necessarily rests on the assumption that the age factor alone may be used to justify a differentiation — an assumption plainly contrary to the terms of the Act and the purpose of Congress in enacting it. Differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed.

[33 F.R. 9173, June 21, 1968]

§ 860.104 Differentiations based on reasonable factors other than age — Additional examples.

(a) *Employment of Social Security recipients.* (1) It is considered discriminatory for an employer to specify that he will hire only persons receiving old age Social Security insurance benefits. Such a specification could result in discrimination against other individuals within the age group covered by the Act willing to work under the wages and other conditions of employment involved, even though those wages and conditions may be peculiarly attractive to Social Security recipients. Similarly, the specification of Social Security recipients cannot be used as a convenient reference to persons of sufficient age to be eligible for old age benefits. Thus, where two persons apply for a job, one age 56, and the other age 62 and receiving Social Security benefits, the employer may not lawfully give preference in hiring to the older individual solely because he is receiving such benefits.

(2) Where a job applicant under age 65 is unwilling to accept the number or schedule of hours required by an employer as a condition for a particular job, because he is receiving Social Security benefits and is limited in the amount of wages he may earn without losing such benefits, failure to employ him would not violate the Act. An employer's

condition as to the number or schedule of hours may be "a reasonable factor other than age" on which to base a differentiation.

(b) *Employee testing*. The use of a validated employee test is not, of itself, a violation of the Act when such test is specifically related to the requirements of the job, is fair and reasonable, is administered in good faith and without discrimination on the basis of age, and is properly evaluated. A vital factor in employee testing as it relates to the 40-65-age group protected by the statute is the "test-sophistication" or "test-wiseness" of the individual. Younger persons, due to the tremendous increase in the use of tests in primary and secondary schools in recent years, may generally have had more experience in test-taking than older individuals and, consequently, where an employee test is used as the sole tool or the controlling factor in the employee selection procedure, such younger persons may have an advantage over older applicants who may have had considerable on-the-job experience but who due to age, are further removed from their schooling. Therefore, situations in which an employee test is used as the sole tool or the controlling factor in the employee selection procedure will be carefully scrutinized to ensure that the test is for a permissible purpose and not for purposes prohibited by the statute.

(c) *Refusal to hire relatives of current employee*. There is no provision in the Act which would prohibit an employer, employment agency, or labor organization from refusing to hire individuals within the protected age group not because of their age but because they are relatives of persons already employed by the firm or organization involved. Such a differentiation would appear to be based on "reasonable factors other than age."

[34 F.R. 322, Jan. 9, 1969, as amended at 34 F.R. 9709, June 21, 1969]

44 Fed. Reg. 68,858 (Nov. 30, 1979):

29 C.F.R. Part 1625

Proposed Interpretations; Age Discrimination in Employment Act

AGENCY: Equal Employment Opportunity Commission

ACTION: Proposed Interpretations.

SUMMARY: On July 1, 1979, pursuant to Reorganization Plan No. 1 of 1978, 43 FR 19807 (May 9, 1978) responsibility and authority for enforcement of the Age Discrimination in Employment Act of 1967, (ADEA) as amended, 29 U.S.C. 621, 623, 625, 626-633 and 634 was transferred from the Department of Labor to the Equal Employment Opportunity Commission. The Commission assumed enforcement of the ADEA on that date. The Commission proposes to adopt, except as modified herein, certain of the interpretations of the Department of Labor with respect to the enforcement of the Age Discrimination in Employment Act of 1967, as amended. The Department's interpretations currently appear at 29 CFR Part 860.

The age discrimination interpretations of the Department of Labor, issued in 1968 and amended several times thereafter, have been revised to reflect the statutory changes made in 1974 and 1978 as well as to reflect both the impact of judicial decisions and the past experience of the Department of Labor and the Commission. It is the Commission's position that these proposed interpretations be interpreted in a manner which is consistent with Title VII of the Civil Rights Act of 1964. The Commission has deleted many of the examples contained in the Department of Labor Interpretations. In some instances the deletions were made for stylistic purposes while in other instances examples were deleted because they were inconsistent with current law or because the Commission needed to accumulate expertise in certain areas.

* * *

1625.7 Differentiations based on reasonable factors other than age.

(a) Section 4(f)(1) of the Act provides that "It shall not be unlawful for an employer, employment agency, or labor organization * * * to take any action otherwise prohibited under paragraphs (a), (b), (c), or (e) of this section * * * where the differentiation is based on reasonable factors other than age * * * *"

(b) No precise and unequivocal determination can be made as to the scope of the phrase "differentiation based on reasonable factors other than age." Whether such differentiations exist must be decided on the basis of all the particular facts and circumstances surrounding each individual situation.

(c) A factor, upon which a differentiation is based, is not a valid defense, however, if age discrimination comprises any element of the employment decision adverse to the applicant or employee, either expressly or by implication.

(d) When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the ground that it is a "factor other than age," and such a practice has an adverse impact on persons in the protected age group and cannot be shown to be related to job performance, such a practice is unlawful. A vital factor in employee testing as it relates to the 40-70 age group protected by the statute is the "test-sophistication" or "test-wiseness" of the individual. Younger persons, due to the tremendous increase in the use of tests in primary and secondary schools in recent years, may generally have had more experience in test-taking than older individuals and consequently, where an employee test is used as the sole tool or the controlling factor in the employee selection procedure, such younger persons may have an advantage over older

applicants who may have had considerable on-the-job experience but who due to age, are further removed from their schooling.

(e) The burden of proof in establishing that the differentiation was based on factors other than age is upon the employer.

(f) A differentiation based on the average cost of employing older employees as a group is unlawful except with respect to employee benefit plans which qualify for the Section 4(f)(2) exception of the Act. (See also § 1625.10)

* * *

46 Fed. Reg. 47,724 (Sept. 29, 1981):

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 C.F.R. Part 1625

Final Interpretations: Age Discrimination in Employment Act

AGENCY: Equal Employment Opportunity Commission.

ACTION: Final Interpretations; Rescission of Interpretations.

EFFECTIVE DATE: Since the following final agency interpretations are interpretative rules or statements of policy, the 30-day delay in effective date as prescribed in section 553(d) of Title 5 U.S. Code does not apply. Accordingly, these interpretations are effective upon September 29, 1981.

FOR FURTHER INFORMATION CONTACT: John Pagano, Office of the General Counsel, Legal Counsel Division, Equal Employment Opportunity Commission, 2401 E Street, NW, Room 2254, Washington, D.C. 20506, telephone 202-634-6595.

* * *

§1625.7 Differentiations based on reasonable factors other than age.

The Commission received numerous comments on this section and has decided to modify paragraphs (c), (d), and (e) of this section to clarify its position regarding the section 4(f)(1) exception of a reasonable factor other than age.

Paragraph (c) has been rewritten to illustrate that where an employment practice uses age as a limiting criterion, the defense that the practice is justified by the section 4(f)(1) exception of a reasonable factor other than age is unavailable. *See Marshall v. Goodyear Tire & Rubber Co.*, 19 EPD ¶8973

[W.D. Tenn. 1979]. Considerable confusion was generated on the proposed section from the apparent misunderstanding that, as originally written, it applied to the employer's burden of rebutting the *prima facie* case. That was incorrect. The section refers to the use of the Section 4(f)(1) defense of "a reasonable factor other then age," and has been clarified to indicate when that defense is unavailable. c.f. *City of Los Angeles, Department of Water and Power, et al. v. Manhart*, 435 U.S. 702, 712-13 (1978).

Paragraph (d) of § 1625.7 has been rewritten to make it clear that employment criteria that are age-neutral on their face but which nevertheless have a disparate impact on members of the protected age group must be justified as a business necessity. *See Laugesen v. Anaconda Corp.*, 510 F.2d 307 (6th Cir. 1975); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The final interpretation also contains a reference to the Commission's Guidelines on Employee Selection Procedures, 29 CFR Part 1607.

Paragraph (e) of 1625.7 has been modified to clarify its initial intent that when the defense of "a reasonable factor other than age" is raised against an individual claim of discriminatory treatment, the employer bears the burden of showing that the "reasonable factor other than age" exists factually. *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979).

* * *

Signed at Washington, D.C., this 18th day of September 1981.

For the Commission,
J. Clay Smith, Jr.,
Acting Chair, Equal Opportunity Commission

* * *

1625.7 Differentiations based on reasonable factors other than age.

(a) Section 4(f)(1) of the Act provides that

* * * it shall not be unlawful for an employer, employment agency, or labor organization * * * to take any action otherwise prohibited under paragraphs (a), (b), (c), or (e) of this section * * * where the differentiation is based on reasonable factors other than age * * *.

(b) No precise and unequivocal determination can be made as to the scope of the phrase "differentiation based on reasonable factors other than age." Whether such differentiations exist must be decided on the basis of all the particular facts and circumstances surrounding each individual situation.

(c) When an employment practice uses age as a limiting criterion, the defense that the practice is justified by a reasonable factor other than age is unavailable.

(d) When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a "factor other than" age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity. Tests which are asserted as "reasonable factors other than age" will be scrutinized in accordance with the standards set forth at part 1607 of this Title.

(e) When the exception of "a reasonable factor other than age" is raised against an individual claim of discriminatory treatment, the employer bears the burden of showing that the "reasonable factor other than age" exists factually.

(f) A differentiation based on the average cost of employing older employees as a group is unlawful except with respect to

employee benefit plans which qualify for the section 4(f)(2) exception to the Act.

* * *

CASE SCHEDULED FOR ORAL ARGUMENT ON MAY 17, 1988

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 87-5361 & 87-5362

CLYDE J. ARNOLD, JR., *et al.*,

Appellees,

v.

POSTMASTER GENERAL,

Appellant.

CHARLES R. NETHERTON, *et al.*,

Appellees,

v.

POSTMASTER GENERAL,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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C.A. Nos. 85-2571 & 86-2291

ARGUMENT

I. The District Court Erred In Applying Disparate Impact Analysis In An ADEA Case

The District Court erred as a matter of law in ruling that the disparate impact theory developed in the Title VII context is applicable to the ADEA. 649 F. Supp. at 676. The Supreme Court has never approved such an extension of the effects test to age discrimination cases (*see Geller v. Markham*, 451 U.S. 945, 947-48 (1981) (Rehnquist, J., dissenting from the denial of certiorari)), and neither the language nor the purpose of the ADEA supports such an interpretation. Although several courts of appeals have applied disparate impact analysis in ADEA cases,[1] this Court has not done so and should not do so in this case.[2]

[1] *See Holt v. The Greenwald Corp.*, 797 F.2d 36, 37 (1st Cir. 1986); *Geller v. Markham*, 635 F.2d 1027, 1032 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981); *Monroe v. United Air Lines, Inc.*, 736 F. 2d 394, 404 n.3 (7th Cir. 1984), *cert. denied*, 470 U.S. 1004 (1985); *Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 690 (8th Cir. 1983); *EEOC v. Borden's, Inc.*, 724 F.2d 1390, 1394 (9th Cir. 1984); *Heward v. Western Electric Co.*, 35 FEP Cases 807, 810 (10th Cir. 1984); The Fifth Circuit has expressly left the question open. *Adkins v. South Central Bell Telephone Co.*, 744 F.2d 1133, 1136 (5th Cir. 1984); *Thornbrough v. Columbus and Greenville Railroad Co.*, 760 F.2d 633, 643 n.13 (5th Cir. 1985). Decisions in the Third and Eleventh Circuits discuss disparate impact analysis in the context of ADEA actions but have not applied it. *Blum v. Witco Chemical Corp.*, 829 F.2d 367, 372 (3rd Cir. 1987); *Allison v. Western Union*, 680 F.2d 1318, 1321-22 (11th Cir. 1982).

[2] Two ADEA decisions of this Court have made reference to disparate impact analysis. *Schmid v. Frosch*, 680 F.2d 248, 250-51 (D.C. Cir. 1982); *Krodel v. Young*, 748 F.2d 701, 709 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 817 (1985). However, both cases were analyzed and decided under disparate treatment analysis, and neither addressed the question of whether disparate impact analysis should be applied under the ADEA.

Section 4(f)(1) of the ADEA provides that it "shall not be unlawful for an employer . . . to take action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1).[3] A similar defense is found in the Equal Pay Act,[4] but not in Title VII. The Supreme Court has stated that the presence of this defense in the Equal Pay Act distinguishes that statute from Title VII and would preclude the application of the effects test in Equal Pay Act cases:

> Title VII's prohibition of discriminatory employment practices was intended to be broadly inclusive, proscribing "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." . . . The fourth affirmative defense of the Equal Pay Act, however, was designed differently, to confine the application of the Act to wage differentials attributable to sex discrimination . . . . Equal Pay Act litigation therefore has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on bona fide use of "other factors other than sex."

Washington County v. Gunther, 452 U.S. 161, 170 (1981) (citations and footnotes omitted); *see also Los Angeles v.*

[3] While section 4(f)(1) is not directly applicable to federal employees (*see* 29 U.S.C. § 633a(f)), this Court has nonetheless looked to it in delineating the burdens of proof in federal sector ADEA cases (*Schmid v. Frosch*, 680 F.2d 248, 250 n.7 (D.C. Cir. 1982); *Cuddy v. Carmen*, 694 F.2d 853, 858 n.23 (D.C. Cir. 1982)), and has held that the same substantive standards should be applied for establishing a violation of the ADEA in federal as in private sector cases (*Id.* at 856). Of course, it would have been very odd for Congress to have intended to curtail disparate impact analysis in private, but not federal, employment.

[4] The Equal Pay Act allows "a differential based on any other factor other than sex." 29 U.S.C. § 206(d)(1).

Manhart, 435 U.S. 702, 710-11 n.20, 713 n.24 (1978); *Geller, supra*, 451 U.S. at 949 (Rehnquist, J., dissenting).

As Judge Easterbrook argues in *Metz v. Transit Mix, Inc.*, 828 F.2d 1202 (7th Cir. 1987), the "reasonable factors other than age" defense in the ADEA "impl[ies] strongly that the employer may use a ground of decision that is not age, even if it varies with age . . . . 'The sentence is incomprehensible unless the prohibition forbids disparate treatment and the exception authorizes disparate impact.'" *Id.* at 1220 (Easterbrook, J., dissenting) (citation omitted).[5]

Moreover, the policy considerations underlying the use of disparate impact analysis in Title VII cases are simply not present in age discrimination cases. In *Griggs v. Duke Power Company*, 401 U.S. at 424, 429-30 (1971), the seminal case for disparate impact analysis under Title VII, the Supreme Court held that Title VII was enacted "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." Accordingly, facially neutral practices that "operate to 'freeze' the status quo of prior discriminatory employment practices" were deemed to be prohibited unless job related. *Id.* at 430. In reaching this conclusion, the Court emphasized the inferior, segregated educational opportunities available to blacks, as well as prior discrimination in employment. *Id.*

[5] *Accord* Blumrosen, *Interpreting the ADEA: Intent or Impact in the Age Discrimination in Employment Act* (1982); Laycock, *Continuing Violations, Disparate Impact in Compensation, and Other Title VII Issues*, 49 L. & Contemp. Prob. 53 (Aut. 1986); Stacy, *A Case Against Extending the Adverse Impact Doctrine to the ADEA*, 10 Empl. Rel L.J. 437 (1985); Callile, *Three Developing Issues of the Federal Age Discrimination in Employment Act of 1967*, 54 Det. J. Urb. L. 431 (1977).

This need to avoid perpetuation of past discrimination has no applicability in the age discrimination context.[6] Unlike a facially neutral test which may have a disproportionate effect on minority applicants because of past discrimination in educational opportunities, a neutral practice which disadvantages older workers is not the product of prior discrimination against workers in the protected age group. *See* Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 Stan. L. Rev. 837 (1982); Maltz, *The Expansion of the Role of the Effects Test in Antidiscrimination Law: A Critical Analysis,* 59 Neb. L. Rev. 345, 353-57 (1980). Rather, older workers are confronted with a different type of bias. As Senator Javits, one of the sponsors of the Act, noted:

> [T]here is simply a wide-spread irrationality that once men and women are past a certain age they are no longer capable of performing even some of the most routine jobs.

113 Cong. Rec. 31253 (1967).

The ADEA was enacted to protect older workers against intentional bias as a result of stereotyping them as less able to perform because of their age. Of course, the aging phenomenon permits all to attain this unique and limited protection from intentional discrimination only when the age of 40 is reached — reflecting the mutability of the characteristic encompassed by the ADEA. (DX 55A-C; A 129). Thus, in this context, the ADEA was designed to protect workers by precluding discrimination *because* they aged, not,

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[6] Then Secretary of Labor Wirtz issued a report in 1965 in response to the direction of Congress in Section 715 of the Civil Rights Act of 1964 that he conduct a study with recommendations for "legislation to prevent arbitrary discrimination in employment because of age . . . ." The report recognized at the outset the differences between age and race discrimination. "The Older American Worker: Age Discrimination In Employment" (June 1965), in Legislative History of the Age Discrimination in Employment Act (Washington: U.S. Government Printing Office, 1981), p. 2.

as in the *Griggs* context, to break down barriers to advancement of the protected group even in the absence of intentional discrimination. Accordingly, it would be "inappropriate simply to transplant [Title VII] standards in their entirety into a different statutory scheme having a different history." *See Washington v. Davis*, 426 U.S. 229, 255 (1976) (Stevens, J., concurring).

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